149 US 580

RECORD, CASE No. 15,250.

652

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1280.

JOHN LOEBER, PLAINTIFF IN ERROR,

vs.

J. HENRY SCHROEDER, ADMINISTRATOR OF CATHERINE LOEBER, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED FEBRUARY 3, 1893.

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1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held for the said State, at the city of Annapolis, on the first Monday of October, it being the third day of said month, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America the one hundred and sixteenth, present—

Hon. Richard H. Alvey, chief judge.
" Henry Page,
" John M. Robinson,
" David Fowler,
" Charles B. Roberts, } Associate judges.
" James McSherry,
" John P. Briscoe,
" Wm. Shepard Bryan,

J. Frank Ford, clerk.

among other were the following proceedings, to wit:

2 UNITED STATES OF AMERICA, *ss:*

The Seal of the Circuit Court of Maryland.

The President of the United States of America to the honorable the judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of Maryland, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Loeber, appellant, the defendant below, and J. Henry Schroeder, administrator of Catherine Loeber, deceased, appellee, the complainant below, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was

3 drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John Loeber, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and

openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the sixth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland.

Allowed by—
R. H. ALVEY,
Ch. Judge C't App'ls, Md.

[Endorsed:] No. 3. Filed January 10, 1893.

4 Know all men by these presents that we, John Loeber, as principal, and David M. Peregoy, Casmer Vogel, and Albert E. Lewis, as sureties, are held and firmly bound unto J. Henry Schroeder, administrator of Catherine Loeber, deceased, in the full and just sum of sixteen thousand dollars, to be paid to the said J. Henry Schroeder, administrator as aforesaid, his successor or successors, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the court of appeals of Maryland, to wit, the October term for 1892, in a suit depending in said court between John Loeber, appellant, and J. Henry Schroeder, administrator as aforesaid, appellee, a decree was rendered against the said John Loeber, and the said John Loeber having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said J. Henry Schroeder, administrator as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

5 Now, the condition of the above obligation is such that if the said John Loeber shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea

good, then the above obligation to be void; else to remain in full force and virtue.

JOHN LOEBER. [SEAL.]
DAVID M. PEREGOY. [SEAL.]
CASMER VOGEL. [SEAL.]
A. E. LEWIS. [SEAL.]

Sealed and delivered in presence of—
JOHN GENSLER.

Approved by—
R. H. ALVEY,
Ch. Judge C't of Appeals.

MARYLAND, *Baltimore City.*

I hereby certify that on this ninth day of January, 1893, before the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore city, personally appeared David M. Peregoy, one of the within-named obligors, and made oath in due form of law that he is worth five thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

And at the same time personally appeared Casmer Vogel,
6 one of the within-named obligors, and made oath in due form of law that he is worth over six thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

And at the same time personally appeared Albert E. Lewis, the remaining within-named surety, and made oath in due form of law that he is worth five thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that John Gensler, Esquire, before whom the annexed affidavits were made and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice, and verily believe the signature to be his genuine signature.

Seal of the Superior Court of Baltimore City, in the 8th Judicial Circuit of Maryland.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 10th day of January, A. D. 1893.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

7 STATE OF MARYLAND, *set:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is a full and true copy of the bond of which it purports to be a copy, as taken from the original bond now on file in the office of the clerk of the court of appeals aforesaid.

Seal Court of Appeals, Maryland.

In testimony whereof I have hereunto set my hand as clerk and affixed the seal of the said court of appeals this 1st day of February, A. D. 1893.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

8 In the Circuit Court No. 2 of Baltimore City.

Bill of Complaint. (*Filed July 12th*, 1890.)

J. HENRY SCHROEDER, Administrator of Catherine Loeber, Deceased, Plaintiff,
against
JOHN LOEBER, Defendant.
} In the Circuit Court No. 2 of Baltimore City.

To the hon. judge of said court:

Your orator, complaining, says:

1. That Catherine Loeber, late of the city of Baltimore, in the State of Maryland, died in this city on the 28th day of January, 1890, leaving surviving her her husband, the said John Loeber, the above-named defendant, and the following children of a former marriage by her with a certain John Peter Rost, namely, Mary C., now intermarried with J. Henry Schroeder; Amelia, now intermarried with August Schrader, and Ernest Rost, an infant of about fifteen years of age.

2. That at the time of the intermarriage of the said Catherine Loeber with the said John Loeber, to wit, on the 10th day of August, 1882, the said Catherine Loeber, now deceased, then Catherine Rost, widow, was possessed of a large estate, to wit, and undivided seven-ninths of a lot of ground situate in the city of Baltimore on the west side of Eden street, fronting on the west side of Eden street fourteen feet, with an even rectangular depth of ninety feet to a twenty-feet alley, and also of more than nine thousand dollars in cash money, which came to her from the estate of her first husband, said John Peter Rost, deceased.

3. That shortly after their marriage, on or about the — day of ——, 1882, said John Loeber being desirous to improve a vacant lot of ground which he possessed, hereinafter more specifically described, by the erection of houses, and in need of money, the said Catherine Loeber offered to him a loan of eight thousand dollars, part of her own separate estate aforesaid, on condition that he

should pay the said sum of money on and after her death to her said children, saying at the time that she had full trust and confidence in him that he would pay and divide said money among her children after her death and do what was right by the children, and the said John Loeber agreed to take said money under said conditions as a loan from his said wife, and the said eight thousand dollars were then and there in fact loaned by the said Catherine Loeber to her said husband, John Loeber, under the conditions aforesaid.

4. That thereafter, in the year ——, after obtaining said loan aforesaid, the said John Loeber improved his lot of ground and premises situate in the city of Baltimore on the northerly side of the Frederick road and extending northerly also on the easternmost side of Fount Hill avenue by the erection of nine 9 houses fronting on the north side of the Frederick road, now called "Frederick avenue," and of eight houses on the easternmost side of Fount Hill avenue, whereof he is still possessed, and used and applied the money, the eight thousand dollars, as your orators is informed and verily believes, in the erection and completion of said improvements, and that said John Loeber has never repaid to the said Catherine Loeber, deceased, during her lifetime, the said loan of eight thousand dollars or any part or parcel thereof.

5. That after the death of said Catherine Loeber, at the instance and request of the aforesaid surviving children, the said John Loeber was cited to appear in the orphans' court of Baltimore city and requested to take out letters of administration on the estate of his wife, in accordance with the statutes in such case made and provided, and said John Loeber did, on or about the — day of March, 1890, appear in the orphans' court of Baltimore city, and then and there under oath declared that said loan of eight thousand dollars from his said wife was not a part of her estate, but had been given to him as a gift, and then and there refused to give the bond required under the statute from the administrator for said amount of said loan.

6. That thereupon, on the 7th day of June, 1890, letters of administration on the estate of Catherine Loeber, deceased, were granted to your complainant, as will appear by a certified copy of said letters, filed with this bill and marked "Complainant's Exhibit J. H. S. No. 1" and prayed to be taken as a part of this bill of complaint.

7. That said John Loeber has never paid said sum of eight thousand dollars, and continues to deny that the same are a part of the estate of his said deceased wife, and intends to retain and deprive the children of the same and their share thereof, and also your complainant as their representative.

8. That your complainant and said children are remidiless at common law and will be defrauded out of their share and just claims except by the interposition of a court of equity.

To the end, therefore, that this honorable court may pass an order directing and requiring that said John Loeber bring said money into this hon. court to be invested in the name of the estate of said

deceased under the statute for his life, or that said loan may be declared to be a lien on his said property above described and mentioned, payable to the complainant on his, the said John Loeber's, death, and for such other and further relief as the nature of your complainant's case may require—

May it please your honor to grant unto your complainant the writ of subpœna, directed to the said John Loeber, residing in Baltimore city, commanding him to be and appear in this court at some certain day to be named therein and answer the premises and abide by and perform such order or decree as may be passed therein.

And as in duty bound, &c.

LOUIS P. & PERCY C. HENNIGHAUSEN,
Sols. for Complainant.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased.

10 COMPLAINANT'S EXHIBIT J. H. S. No. 1. (Filed July 12th, 1891.)

THE STATE OF MARYLAND, [SEAL.] *Baltimore City,* } *sc:*

The subscriber, register of wills for Baltimore city, doth hereby certify that it appears by the records in his office that letters of administration of all the goods, chattels, credits, and personal estate of Catherine Loeber, deceased, was, on the 7th day of June, in the year of our Lord one thousand eight hundred and ninety, granted and committed unto J. Henry Schroeder, who was then and there appointed administrator of the said deceased.

In testimony whereof I hereunto subscribe my name and [SEAL.] affix the seal of my office this 30th day of June, in the year of our Lord eighteen hundred and ninety.

Test: ROBERT T. BANKS,
Register of Wills for Baltimore City.

Answer of Defendant. (*Filed August 19th*, 1890.)

J. HENRY SCHROEDER, Administrator, &c., Plaintiff,
vs.
JOHN LOEBER, Def'd't. } In the Circuit Court No. 2 of Baltimore City.

The answer of John Loeber, the defendant, to the bill of complaint of J. Henry Schroeder, administrator of Catherine Loeber, deceased, against him in the circuit court No. 2 of Baltimore city, exhibited.

This defendant, reserving all right of exceptions to the said bill of complaint, for answer thereto says:

1. This defendant admits the facts set out in the first allegation of the bill of complaint.

2. This defendant admits that at the time of her marriage with

him the said Catherine Loeber, then "Rost," was possessed of an undivided interest in the property mentioned in the second paragraph of said bill, and he avers that said interest remains unimpaired as a part of her estate; that at that time she had a considerable sum of money, but he does not know the exact amount, but he believes the same to have been far short of nine thousand dollars.

This defendant never inquired nor did his said wife ever tell him nor does he now know the amount of money she had nor where she kept the same, but this defendant believes she kept the same in some savings institution in Baltimore city, and the book of deposit, or a copy thereof, would be the best evidence.

3. This defendant denies that he ever borrowed eight thousand dollars or any sum or sums of money from his said wife upon the conditions or under the circumstances set forth in the third paragraph of said bill or upon any other conditions or under any other circumstances. He denies that at any time in 1882 he contemplated or desired to improve his vacant land, and he further denies that any of the money belonging to his said wife at the time of
11 her marriage to this defendant was in 1882 or at any other time used or invested in the improvement of said vacant land or any land.

4. This defendant admits that he has improved his land, as set out in the fourth paragraph of the bill, and that he is still possessed of the same, but he denies that his said wife's money or any part of it was used for such improvements or any part of them, and he again denies that his said wife ever loaned him any money for that purpose or for any other purpose.

5. This defendant admits that he was cited to appear in the orphans' court, as stated in the 5th paragraph of the bill, and he avers that he did appear in said court and he did tender a bond upon the estate of his said wife. He denied then and there that the said estate comprised the sum of eight thousand dollars or any sum due from him, and he refused to give a bond in an amount based upon such assumption, and he says he did not make the statement in the orphans' court, as is alleged in said paragraph.

6. The allegations of the sixth paragraph of the bill are admitted.

7. This defendant says he owes nothing either to his said wife's estate or to her children, and he denies that either the children or the complainant, as their representative, have any claim against him either at law or in equity.

8. The defendant further says that the complainant has failed to make proper parties to his said bill.

9. The defendant further says that no case is stated in said bill of which this honorable court can take jurisdiction.

This defendant having fully answered, he prays to be hence dismissed with his costs in this behalf so wrongfully sustained.

And he will ever pray, &c.

SAMUEL REGESTER,
Sol'r for Def'd't.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this nineteenth day of August, in the year one thousand eight hundred and ninety, before me, the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, personally appeared John Loeber, the defendant in the above cause, and made oath, in due form of law, that the matters and things contained in the foregoing answer are true, as therein set forth, to the best of his knowledge and belief.

PETER TARGARONA, *J. P.*

General Replication. (*Filed November* 20, 1890.)

J. HENRY SCHROEDER, Administrator, *vs.* JOHN LOEBER. } In the Circuit Court No. 2 of Baltimore City.

To the Honorable D. Giraud Wright, judge of said court:

The plaintiff join- issue on the matters alleged in the answer
12 of John Loeber, so far as the same may be taken to deny or avoid the allegations of the bill.

LOUIS P. & PERCY C. HENNIGHAUSEN,
Solicitor- for Plaintiff.

Report of Examiner and Depositions. (*Filed April 14th,* 1891.)

J. HENRY SCHROEDER *vs.* JOHN LOEBER. } In the Circuit Court No. 2 of Baltimore City.

The above cause being at issue, and I, A. De Russy Sappington, examiner, having been notified by the solicitor for the plaintiff of a desire to take testimony in the above-entitled cause, I then, under and by virtue of an order of the circuit court No. 2 of Baltimore city, passed in said cause on the 20th day of November, 1891, met on the 24th day of November, in the year eighteen hundred and ninety-one, in the city of Baltimore, in the State of Maryland, and assigned the 26th day of November, in the same year, at three o'clock in the afternoon, and the office of Mess. L. P. & P. C. Hennighausen as the time and place for such examination of witnesses in said cause; at which last-mentioned time and place I attended, due notice of such meeting having been given, and proceeded, in the presence of the solicitors of the respective parties, to take the following depositions—that is to say:

Philip Rost.

PHILIP ROST, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, deposeth and saith as follows—that is to say:

By the EXAMINER:

1 Q. State your name, residence, and occupation.

A. Philip Rost; 500 Ensor street; I am in the wholesale liquor business.

2 Q. Do you know the parties to this suit?

A. I know both the parties.

By Mr. HENNIGHAUSEN:

3 Q. Did you know Catherine Loeber, the late wife of John Loeber; and, if yea, in what relation did she stand to you during her lifetime?

A. I did; she was my sister-in-law; she had been my deceased brother John Peter Rost's wife.

4 Q. When and where did John Peter Rost die?

A. He died in January, in 1881, in Baltimore city, at his own house.

5 Q. Did your brother, John Peter Rost, have any children by his wife, Catherine, who married John Loeber? If yea, please name them.

A. He did; he had three living at the time of his death; he had some who died during his lifetime; one daughter named Mary, who has intermarried with J. Henry Schroeder; Amelia, who intermarried with August Schrader; Ernest Rost, who is now a minor.

13 6 Q. In what relation do you stand towards your nephew, Ernest Rost?

A. I am his guardian.

7 Q. How old is he now?

A. He is fifteen years of age.

8 *m* Q. State whether or not Catherine, the widow of your brother, John Peter Rost, receives any money from the estate of her deceased husband; and, if yea, state how you obtained that knowledge.

A. She did; she received one-third of the whole property that was there, consisting of about $20,000 in cash, and a house. I know that because I was administrator with her, and the amount she received was $8,975, which is on this paper (filed, marked "Plaintiff's Exhibit Examiner P. R. No. 1"), and all the estate passed through my hands——

(Answer objected to by Mr. Register, and to the admission of the paper.)

WITNESS (continuing): —including $1,600, which she had in her own name in the bank, and $6,675 she got on her part, and commissions she got, and money which was afterwards collected by her, amounting — $700 in all.

(Answer objected to by Mr. Register.)

9 Q. Where did you get the memorandum which you handed to the examiner?

A. I put it over myself on this piece of paper; that was what Mr. Benzinger said. There was two hundred and sixty-odd dollars left after the whole estate was settled.

(Answer objected to.)

10 Q. Do you know what she did with the money which came to her at the time of the settlement of her husband's estate?

A. Yes, sir; she had in the Baltimore savings bank, and by my requesting the orphans' court an order to leave my ward's money there. I handed the order to Mr. Sterling, the president of the savings bank. He first refused to keep it—that was the boy's money—then we both begged him, the boy's mother and me. He said he would keep the boy's money provided the mother would take out every dollar the mother had in the bank, and how much he got out I can't tell, but what she took I went up with her to the German savings bank and she deposited it there.

11 Q. Do you know about how much it was?

A. Indeed, I don't. The greatest part of the money was in the Eutaws savings bank, and she left it there.

12 Q. Did your sister-in-law, Catherine Rost, remain single?

A. She married again. I don't know how long she remained single; she married John Loeber.

13 Q. Is she living now; if not, when did she die?

A. She is dead; she died, I think, the 20th or 28th of January, 1890.

14 Q. Did she leave any children by her marriage with John Loeber?

A. No, sir.

14 15 Q. Did she have any other children but those which you have named living at the time of her death?

A. No; none but those I have named.

16 Q. After the death of Mrs. Catherine Loeber, did you or not take any step to ascertain whether she left any estate in which your ward, her son, was interested? If yea, state what you did.

A. I had an interview once with Mr. Loeber, after her death, in my house; I asked him whether his wife had given him all this money without any receipt, note, or testament written—that is to say, was there anything to show for what money she had given him? He answered, "No; that we did not need that." He said, "We fixed that by way of testament." "I had made my last will," he said, and in this, if I should die first, that my wife Catherine should get all her money back which she had given me, and besides that the part of his own which would be coming to his wife. That is all I know of; I had no other conversation.

17 Q. How did you know that he had any of her money?

A. Why, he told me so; if he hadn't, he could not have told me that he was going to give it back to her.

18 Q. How did he come to tell you?

A. Through the questions I put to him whether he had any writing. He admitted that she had given him her money, and he, in his last will, said that she should get it back if he should die before her.

19 Q. Was there anything said as to the amount?
A. No; he didn't name any amount.
20 Q. What else did you say to him in reference to your ward's interest in her estate?
A. I don't know anything of any account.
21 Q. Were you present at the taking of the testimony of Mr. Loeber in the orphans' court?
A. Yes, sir.
22 Q. Do you recollect what he testified?
A. I am a little hard of hearing and was sitting a good ways off; there was very little that I heard of that.
23 Q. Have you had any other conversation with Mr. Loeber in reference to your ward and his share in his mother's estate?
A. Not about the estate; other affairs.

Cross-examination waived.

Question by the EXAMINER: Do you know or can you state any other matter or thing that may be to the benefit or advantage to the parties to this suit or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If so, state the same fully and at large in your answer.
A. No.

(Signature waived.)

Justis Henry Schroeder.

JUSTIS HENRY SCHROEDER, the plaintiff in this case, pro-
15 du-ed on his own behalf, having been first duly sworn, deposeth and saith as follows—that is to say:

1 Q. State your name, residence, and occupation.
A. Justis Henry Schroeder; 439 E. Townsend street; I am a druggist.
2 Q. Do you know the parties to this suit?
A. I am the plaintiff and know all the parties.

By Mr. HENNINGHAUSEN:

3 Q. How were you related to the late Catherine Loeber?
A. *A.* I was married to her daughter, Mary C. Schroeder.
4 Q. Did Mrs. Catherine Loeber leave any estate; and, if yea, of what did it consist?
A. I knew that she inherited some money from her first husband; as to the amount I don't know.
5 Q. Where is the money now?
A. That I don't know.
6 Q. What did she do with the money?
A. That is a question I can't answer, for I was never drawn into their conferences.
7 Q. I did not ask you whether you were drawn into their conferences or whether she told you herself. My question is, have you any knowledge whatever as to what she did with her money?

A. I have only got the knowledge I obtained on information.

8 Q. State whether or not you ever heard Mr. Loeber, the surviving husband, talk about her money.

(Objected to.)

A. Not until after her death, when I went out to see him one day.

9 Q. What was said by you and what was said by him at that interview?

A. I went out there in company with my brother-in-law, Mr. August Schroeder; we conversed about the matter; we told him we did not make any demand for the money, but all we asked was for him to give us a surety that the money which he obtained from mother be paid back to us after his death; we said to him that he might again get married and we might then have trouble, and he answered, "I don't think you have any claim now, but that you would have a right to make the claim should the marriage take place." He also told us that the amount was about $8,000, and we also had a conversation with him in regard to the boy's money—that is, the interest of his money invested; I said to him that I thought it was as little as he could do to draw the boy's interest and charge it up as board; his answer was, "That the money was only paying a small interest in bank; being that was the only way he could draw it, he had made a better investment, so that it would realize a larger per cent. of interest." When asked would he show or say how he had invested the money, he positively refused; he said that it was not $9,000, but $8,000; we made a claim for $9,000; that is all that I can remember unless further questioned; my reason for saying that was that the boy had to work out and to work very hard, too.

16 10 Q. What boy do you mean?

A. Ernest Ross.

11 Q. Where was Ernest Ross during the lifetime of his mother?

A. With her.

12 Q. Where is he now?

A. With me.

13 Q. Is Mr. Loeber still single?

(Objected to.)

A. No, sir.

14 Q. Is he married?

(Objected to.)

A. He is.

15 Q. When did Mr. Loeber marry again?

(Objected to for irrelevancy.)

A. Indeed I don't know, but it was some time this summer.

16 Q. Did you have any other conversation with him in reference to the estate of his wife?

A. No, sir.

17 Q. Were you present in the orphans' court when Mr. Loeber gave his testimony in reference to the estate of his wife; if yea, what did he say?

A. Yes; he admitted of having received the money, and promised that he would do what was right by his children.

18 Q. State whether or not you recollect of him saying anything about a last will and testament; and, if yea, what did he say.

A. I don't remember.

19 Q. Do you recollect any more of his testimony than you have stated?

A. He stated that the money was given to him without any guarantee, because she had implicit confidence in him that he would do what was right.

Cross-examination:

1 X Q. How many conversations did you have with Mr. Loeber in reference to the estate of his late wife?

A. One only, to the best of my knowledge.

2 X Q. Will you state who was present at that conversation and where it occurred?

A. My brother-in-law, Mr. August Schroeder; at Mr. Loeber's house.

3 — Q. How long after the death of Catherine Loeber?

A. To the best of my recollection, it was within a month, I believe.

4 X Q. Will you state who was the spokesman at the conversation you have stated, yourself or Mr. Schroeder?

A. Neither of us especially; both of us.

5 X Q. Then the conversation was general, I understand?

A. Yes.

17 6 X Q. Were you present during the time that Mr. Schroeder and Mr. Loeber were conversing?

A. We went there together and left together, and were there together during all the time.

7 X Q. And you heard everything that was said upon both sides, did you not?

A. Yes.

8 X Q. Will you state why you called upon Mr. Loeber, and what demand or demands, if any, did you make?

A. We went there to see him in regards to mother's estate, and asked of him to give us a guarantee of the money received by him of mother. We only asked for a guarantee that the money would be paid back to us after his death. That was our main object in going out there.

9 X Q. Who told you that she had any money?

A. Well, being one of the family and interested, I didn't know what money left her by her first husband.

10 X Q. When did you marry the daughter of John Peter Rost, before or after his death?

A. Before his death.

11 X Q. Did or did not your wife receive her portion of her father's estate?

A. She did.

12 X Q. You have alleged in your bill of complaint that John Loeber had borrowed from his late wife the sum of $8,000, and you have also alleged that said money is invested in improving certain property on the north side of the Frederick road. Will you state where you received that information?

A. I received that information from my sister-in-law, Mrs. Amelia Schrader.

13 X Q. Then you have no knowledge of the amount left by Catherine Loeber nor whether she invested any money or not during her lifetime, have you?

A. No, sir.

14 X Q. You have also stated in your bill that Catherine Loeber, at the time of her marriage with John Loeber, was possessed of over $8,000 in cash. Will you state upon what information?

A. I was so informed by Mr. Philip Rost, and also saw the last will of my deceased father-in-law.

15 X Q. Mr. Philip Rost told you that she had $9,000, did he not?

A. As to the amount I can't specify. I know we made calculations, and, to the best of my knowledge, the amount was over $9,000.

16 X Q. As the result of that calculation you demanded $9,000 from Mr. Loeber, did you not?

A. No; we didn't make any demand on Mr. Loeber, only that we thought it was $9,000, and he then specified that it was not $9,000; it was $8,000.

—. Have you examined the final administration account passed in the estate of John Peter Rost?

A. I think I have seen it.

17 X Q. Have you any knowledge outside of hearsay evi-
18 dence of the amount of money possessed by Catherine Rost at the time she married John Loeber?

A. No, sir.

18 X Q. Have you inquired at the Eutaw savings bank or the German savings bank for a copy of Catherine Rost's bank book?

A. Not for a copy; but we asked the clerk (I suppose that is the proper name for him) whether he could give us any information in regard to the amount of money Mrs. Catherine Rost had on deposit.

19 X Q. Then I understand you to say that you do not know the exact amount that she had when she married John Roeber?

A. I do not.

The taking of testimony was then adjourned until Friday afternoon, December 5th, 1890, at the same place, at which last-mentioned time and place, due notice of such meeting having been given, I attended, and, in the presence of the solicitors of the respective parties, proceeded to take the following depositions—that is to say:

Cross-examination continued:

20 X Q. How long did Catherine Rost remain single after the death of John Peter Rost?

A. About nineteen months.

21 X Q. Where did she live during that time?

A. A best part of the time she lived with me.

22 X Q. What family had she with her, if any?

A. Her boy, Ernest.

23 X Q. Who supported her during this time?

A. Supported herself.

24 X Q. Do you mean that she worked and supported herself so that she paid her board and expenses out of her own money?

A. A. Well, her expenses were very slight, because we charged her no rent, and then she spent part of her time with the other daughter, down at Canton.

25 X Q. Then do I understand you to say that she paid no board at either place for herself and her minor son during the eighteen months of her said widowhood?

A. Yes, sir.

26 X Q. What became of the house left by John Peter Rost?

A. It belongs to her estate still.

27 X Q. Did not your wife and Mr. Schroeder's wife each have a $\frac{2}{9}$ interest in the house after the father's death?

A. They had, but they sold it to their mother.

28 X Q. For how much?

A. Two hundred dollars each, as well as I remember.

29 X Q. Did not the mother-in-law put some improvement on that house during her widowhood?

A. I don't remember.

30 X Q. Your wife, Mr. Schroeder's wife, and Ernest Rost each received their share of their father's estate, did they not?

A. Yes, sir.

19 31 X Q. You have said in your bill of complaint that Catherine Loeber had every confidence in her husband, John Loeber; that is true, I presume?

A. I don't remember that I said that; I think that is a statement of his own.

32 X Q. Then you did not say this in your bill of complaint?

A. A. I don't think that is in there—that wording.

33 X Q. Is it not true that she had full confidence in him?

A. She seemed to think a great deal of him.

34 X Q. Will you state whether John Loeber and his wife lived happily together or not?

A. So far as I know; yes.

35 X Q. What has been the character of the relations of all Catharine Rost's children with their stepfather during the seven and a half years of their married life?

A. Pleasant.

36 X Q. What has been the character of his relations towards them?

A. The same.

37 X Q. You have said before the examiner that you did not make a demand on John Loeber for the money you alleged his wife gave him, but in your bill of complaint you say he borrowed the money under the promise to divide it among her children after her death. If this be true, why did you not demand that he keep his promise?

A. We did not make a demand, but merely asked him to give us an agreement or guarantee that the money be paid back to the children after his death.

30th X Q. You have alleged in the third paragraph of your bill in these words: "That she had full trust and confidence in him that he would pay and divide said money among her children after her death;" and in another part of the same paragraph you use these words: "The said Catharine Loeber offered to him a loan of $8,000, part of her own separate estate aforesaid, on condition that he should pay the said sum of money *and* after her death to her said children." Why did you not demand that he keep that promise, knowing, as you seem to know by these allegations, that he made said promise?

(Question objected to for that only parts of said paragraphs are given to said witness, which do not express in full the meaning thereof, and which only do so when read in connection with the other parts of the paragraphs.)

A. Well, I think that we did ask him for that, and upon his refusal we had him summoned before the orphans' court.

39 X Q. You have already said that you made no demand on John Loeder for the money. Do I now understand you to say that you did make a demand and upon his refusal you had him summoned — the orphans' court?

A. Well, no; we did not make a demand for the money.

40 X Q. What, then, do you mean when you say, in response to the previous question, we did make a demand, and that upon his refusal had him summoned to the orphans' court?

A. Upon his refusal to give us an assurance that the money would be paid back upon his death is why we had him summoned to the orphans' court.

41 X Q. You have alleged in the 3rd paragraph of your bill of complaint that Catherine Loeber loaned her husband, John Loeder, $8,000; how do you know this?

A. The information in regard to the loan I received from my brother-in-law, August Schrader.

42 X Q. You have alleged in your bill of complaint that in the orphans' court John Loeber admitted that he had borrowed from his late wife $8,000; you now say that he admitted having received the money; will you state whether or not he did not deny in the orphans' court absolutely having ever borrowed one cent from her?

A. I don't remember.

43 X Q. Has he not always denied to you and in your presence having ever borrowed any money from his late wife?

A. No, sir.

44 X Q. Are you positive that John Loeber ever told you in any manner that he received $8,000 from his late wife?

A. Yes, sir.

45 X Q. Where?

A. In his own house.

46 X Q. When?

—. I don't know about what time, but it was shortly after our mother-in-law's death.

47 X Q. If it should now turn out that she had but six thousand dollars when she married John Loeber would you still insist that he received $8,000?

A. Yes, sir.

48 X Q. Did Ernest Rost live with his stepfather and his mother during the seven years they were married?

A. Yes, sir.

49 X Q. Did he attend school during that time?

A. Yes, sir.

50 X Q. You allege in your bill that in 1882 John Loeber borrowed from his wife the sum of $8,000 for the purpose of improving certain property mentioned in the bill; do you know when those improvements were begun and when they were finished?

A. No, sir; I am not positive of the date or the time.

51 X Q. How, then, do you know that he used the money you allege he received from her in those improvements?

A. Upon information received from my brother-in-law and sister-in-law.

52 X Q. Then you have no knowledge of your own of what disposition was made of the money, have you?

A. No, sir.

53 X Q. Why have you not made inquiry at the bank where your mother-in-law kept her money and produced here the exact amount she had when she married John Loeber instead of making an allegation that she had $9,000, and then saying before the examiner that you don't know how much she had?

21

A. We did make inquiries at the Eutaw bank, but it refused to tell us how much money was to her credit.

54 X Q. And you took no other steps to discover the exact amount she had when she married John Loeber?

A. Being refused a statement by the Eutaw bank, I saw my wife's uncle, who was joint administrator of the estate of John Peter Rost, and from him I got the amount.

55 X Q. You say you made calculations as to the amount she had when she married John Loeber; will you please state how those calculations were made, and by whom?

A. The administrator of course knew how much money she was possessed of, and it was from him I got my information.

56 X Q. When was this calculation made?

A. Several times.

57 X Q. Before or after her death?

A. After her death.

58 X Q. Your mother-in-law was a charitable woman, was she not?

A. Yes, sir.

59 X Q. In your calculations upon which you allege that she had $9,000 when she married John Loeber, did you make any allowance for her expenses and those of her child, and *and* for her son, and for the improvements she made upon the house, and for the four hundred dollars you say she paid your wife and Mrs. Schrader?

A. No, sir.

Re-examination.

By Mr. HENNIGHAUSEN:

1 R. D. Q. You were asked in your cross-examination that if it should now turn out that if Mrs. Loeber had at the time of her marriage but $6,000 would you still insist that she loaned Mr. Loeber $8,000, and you answered yes; how do you explain that conflict?

A. That was his own testimony that he had received that much.

Question by the EXAMINER: Do you know or can you state any other matter or thing that may be to the benefit or advantage of the parties to this suit or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If so, state the same fully and at large in your answer.

A. I do not know of anything else.

(Signature waived.)

Amelia Schrader.

AMELIA SCHRADER, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, deposeth and saith as follows—that is to say:

By the EXAMINER:

1 Q. State your name, residence, and occupation.

22 A. Amelia Schrader; 2920 Elliott street, Canton; no occupation.

2 Q. Do you know the parties to this suit?

A. Yes, sir.

By Mr. HENNINGHAUSEN:

3 Q. You are a daughter of the late Mrs. Catherine Loeber? When did your father, Peter Rost, die?

A. Yes, sir. My father died in 1881.

4 Q. Were you married at that time?

A. Yes, sir.

5 Q. State whether you were present when your father's estate was settled; and, if yea, when and where did it take place and who were present.

A. I was present; at Lawyer Benzinger's office; I think it was six months after father's death; my husband, my sister, Mrs. Schroeder, my uncle, Philip Rost, and my mother.

6 Q. State of you know how much of that estate of your father's came to your mother.

(Objected to because the administration account is the best evidence of that fact.)

A. $7,000 and $300.

7 Q. Did your mother have any other money than that which she received from your father's estate?

A. She did; she had a bank account of her own.

8 Q. How much?

(Objected to because the bank book of the officer of the bank is the best evidence.)

A. $1,600 she had.

9 Q. How do you know?

A. I remember when father made this amount over to mother.

10 Q. Did she have any other money besides this $1,600 and her portion of his estate?

A. Yes, sir. There was some money in the house when father died, in gold. The exact amount I can't say how much is was.

11 Q. How much did your mother possess in all?

A. I think with the estate she got and the money in bank it was eight or nine thousand. The exact amount I can't say, because I did not know what she had at home.

12 Q. When did your mother marry again?

A. About one and a half years after father's death.

13 Q. With whom did she live till then?

A. She lived part of the time with me and part of the time with my sister.

14 Q. What were her expenses of living during that period?

A. I do not think they were a great deal, because when she was at our house it did not cost her anything.

15 Q. What were the habits of your mother as to economy?

A. I think she was very close; she was not extravagant.

23 16 Q. Describe how she was close.

A. Why, I never seen her spend money freely in any way.

17 Q. How much would she spen- a day, a week, or a month?

A. Well, I could not say, but when she came to our place it only cost her her car-fare, I know.

18 Q. Can you describe her mode of living? Did she indulge in luxuries?

(Objected to as leading.)

A. No, sir; she did not.

19 Q. Please describe her mode of living as to the expenditure of money.

A. She lived very plain, I think.

20 Q. How much did her dress cost her a year?

(Objected to as leading.)

A. I could not say exactly how much, but mother did not get very many, as she was very saving.

21 Q. What is considered many by some will be considered moderate by others. What is called closeness by one person will be called extravagance by another person. The information I desire is if you know about how much in any year your mother spent of her estate after the death of your father and before she married with John Loeber.

(Objected to unless the witness will also state upon what information she bases her calculations, if any she makes.)

A. I don't think mother spent any of her estate, because she got the rent from the house on Eden street, and I think she lived off of that.

22 Q. How much was that rent?

A. Sixteen dollars per month.

23 Q. When did your mother die?

—. 28th January, 1890.

24 Q. Were your relations with your mother during her lifetime affectionate or otherwise?

A. Very affectionate.

25 Q. Have you children?

A. Yes, sir.

26 Q. How was she to your children?

(Objected to as irrelevant.)

A. I know she loved them dearly.

27 Q. How often did she visit you or you visit her?

A. She visited us about every two weeks. I also visited her every month or so.

28 Q. State whether or not you had any conversation with Mr. Loeber concerning the estate of your mother, and, if yea, state when and where it took place and what was said by you and Mr. Loeber or by any other person in Mr. Loeber's presence or hearing.

A. I had a conversation with him one week after mother's death in Mr. Loeber's sitting-room. I told Mr. Loeber we had come
24 out to see about mother's affairs and if there was not a settlement to be made. He stated, There is no settlement to be made—that what mother had, he had it; then he went off to tell us, and he told us he was pushed for money and in the act of borrowing money, and mother said, Why not take my money and put it in those houses, invest it for me, as it only brings three per cent. at the bank, and that way it will bring me more? My husband then asked, Didn't you give her any writing or proof that she gave you the money? He said it was not necessary to give any writing, that he had made a will; that after his death the money that mother had loaned him should be paid out first to her after his death; then she would get her widow's part and the rest be divided among the children; then my husband said, But you can destroy the will and get married again; then Mr. Loeber said, It is then time to make a

fuss about it; then I said to Mr. Loeber, I thought you had said when you married mother that you did not want her money, that you had plenty of your own; he then said, Do you think that I am a fool—get to be sixty-four years old and marry a woman and not get the good of her if I can? He then said, If you girls make a great deal of fuss about it, I will show you what I can do; I have got the money; I can do with it as I please; I will (*will*) give it all to your brother, meaning Ernest Rost. I then said to Mr. Loeber, The worst blow of all we had was to think that he had taken my brother's money, too; I was thinking all the time his money was increasing, and at the same time he, Mr. Loeber, got every dollar of the interest that he could get. He then said that my brother, Ernest Rost, should have it all back again; that he had due bills to show it; then my husband asked him wouldn't he show them to us; he then said not until a certain time.

The taking of testimony was then adjourned to the 12th day of December, 1890, at two o'clock in the afternoon, and the same place, at which time and place I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions—that is to say:

AMELIA SCHRADER resumed:

29 Q. I now request you to continue your answer to the 28 interrogatory, if you have not said all that you know.

A. My husband asked Mr. Loeber if he thought that was sufficient security for the money that mother had loaned him; then he asked me, How much money did your mother have? I told him I thought mother had between 9 and 11,000, meaning the house on Eden street; then he said to me, That shows how much you know about it; then my husband asked him, Well, how much money did mother have? Mr. Loeber said, She had $8,000 in cash, was his answer; then standing at the window in the sitting-room, pointing to the houses, he said that he had invested the money in thouse houses, and if I sell them now I will lose too much money on them, but I intend to do what is right, he said; then he said we had no right to make any fuss about it; that he had a right to it as long as he lived, anyway; that's all I can remember.

30 Q. Has Mr. Loeber any children; and, if yea, how many?

(Objected to as irrelevant.)

A. Yes, sir; he has three.

31 Q. By a former marriage?

A. Yes, sir.

32 Q. When you say that you thought your mother had between 9 and $11,000, meaning the house on Eden street, do you mean that house on Eden street was worth between 9 and $11,000?

A. No, sir; I mean that with the money she had and the house.

33 Q. Where are those houses situated to which he pointed and said that the money was invested therein?

A. They are situated on the Frederick road.

34 Q. Near what street or place?

A. I don't know the name of that little lane; there is a small lane there.

35 Q. How near to Mr. Loeber's residence?

A. The next house to his, about a half a square away, but there is no house between; the same side of the street.

36 Q. When were thouse houses built, if you know?

A. I can't say exactly; they were built after mother went out there.

37 Q. How many houses are there?

A. I think there are 19 altogether.

38 Q. Do you know the size of the houses?

A. I know that some are two-story and a few are three-story; that's all I know about them.

39 Q. Did you have any other conversation with Mr. Loeber in reference to the estate of your mother?

A. No, sir; I did not.

Cross-examined.

By Mr. REGESTER:

1 X Q. I understood you to say, at the last sitting, that your mother had $1,600 in cash of her own; will you please state how you know that?

A. I remember when I was at home when she and father went and deposited this money in bank; they wouldn't take it from father because he had a book there of his own, so it was put there in mother's name.

2 X Q. When was this?

A. The exact time I couldn't say, but it was before I left home.

3 Q X. Can you tell about what year?

A. No, sir, I cannot; don't remember.

4 X Q. Will you state how you know that the amount was $1,600?

A. I heard them speak about it at home it was that much.

5 X Q. Did you ever see the bank book?

A. No, sir; I did not.

6 X Q. Do you know in what bank this money was deposited?

A. I don't know that either.

7 X Q. Can you not state about how many years this was befor you were married?

A. No, sir; I cannot.

26 8 X Q. Then you have no knowledge except that some years ago you heard your father and mother speak of a deposit of $1,600; is this true?

A. Yes, sir; it is.

9 X Q. And you do not know whether your mother or father ever withdrew that money from this bank, if any were deposited?

A. No, sir; only I remember since mother's death our uncle telling us that when things were squared up of father's estate, telling uncle that she still had $1,600 in bank.

10 X Q. Then you have stated that your mother had $1,600 in her own name in bank from the information given you by your uncle, Philip Rost?

A. Not altogether from uncle's information; I can remember not the certain day, but I can remember the day when father and mother went and deposited this money when I was home.

11 X Q. But I understood you to say that you do not know whether this money was withdrawn from the bank by your mother or your father during his lifetime. How, then, can you state that she had $1,600 in 1882, when she married John Loeber?

A. Well, just as I said before, our uncle telling us that mother said she had the money; that's all the answer I can give.

12 X Q. You have said that there was a sum of money in gold in the house at the time of your father's death. Do you know whether or not that money was accounted for to your father's administrators or not?

A. I think it was not; I remember Uncle Philip saying that mother had asked about giving it up or saying anything about it, and Uncle Philip saying he didn't think it was necessary.

13 X Q. Then all you know about this money being in the house is from what your uncle, Philip Rost, has told you, is it not?

A. I was in the house at the time of father's death and remember mother's saying that there was money in the house; that it was not necessary to draw any money for anything at all.

14 X Q. Do you know whether or not that money was used in the payment of funeral expenses of your father?

A. I cannot say what money was used for the funeral expenses; mother attended to that.

15 X Q. Who was present at the conversation between yourself and Mr. Loeber, which you have detailed here?

A. My husband.

16 X Q. No one else?

A. No, sir.

17 X Q. Who did the talking, you or your husband?

A. I think we were both talking.

18 X Q. And I understand you to say that this is the only conversation that you have had with Mr. Loeber with reference to your mother's estate?

A. Yes, sir; it is.

19 X Q. You were present all the time and heard all that was said?

27 A. Not all the time; after supper him and my husband were alone together.

20 X Q. Then I understand you to say that you did not hear everything that was said at that time by Mr. Loeber and by your husband?

A. No, sir; not everything.

21 X Q. And the conversation you have related is what occurred while you were present?

A. Yes.

22 X Q. And you have mentioned all you heard, have you not?

A. Yes, sir.

23 X Q. Are you certain that Mr. Loeber told you he had borrowed money from his wife, or did he say she had given it to him?

A. I am certain he said he had borrowed the money and intended to give it to her back again.

24 X Q. And you are certain that he told you it was exactly $8,000?

A. Yes, sir; he said it was $8,000 in cash, were his words that he used.

25 X Q. When was the first time that you were aware that your mother had disposed of any of her money?

A. A few days before mother's death one of the ladies of the house said she thought, but wasn't certain, that mother had disposed of her money or put her money in those houses.

26 X Q. Who was that lady?

A. Mr. Loeber's daughter.

27 X Q. And you had thought until this time that whatever money your mother had at the time of her marriage was still in her possession; am I right?

A. Yes, sir; I did.

28 X Q. Did you know exactly how much your mother had when she married John Loeber?

A. No, sir; I did not.

29 X Q. How came John Loeber to tell you his wife had $8,000 or he had received that amount; did you ask him how much he had received?

A. My husband asked him how much money mother had; he then said she had $8,000 in cash.

30 X Q. And he said also, I understand you, that he had received all of that amount?

A. He did not say that he had received that amount, but he said that she had that amount.

31 X Q. What amount did he say that he had received?

A. He didn't state any amount.

32 X Q. I understand you to say that the occasion you have referred to was within a week of your mother's death; am I right?

A. Yes, sir.

33 X Q. On this occasion did you and your husband go
28 to Mr. Loeber's house for the purpose of making a visit, or did you go there for the purpose of finding out what had become of your mother's money?

A. Mr. Loeber had asked my husband to come out to see him, that he wished to see him, and then we both went out together, and being that Uncle Rost was guardian over brother he was compelled to know how things stood, and he had said as long as Mr. Loeber had asked you to come out we should go out and ask him how it stood with mother's affairs.

34 X Q. Then you did go there for the purpose of obtaining information with regard to your mother's estate, did you not?

A. Yes, sir; I did.

35 X Q. And you went by the advice of your uncle, Philip Rost?

A. Yes, sir.

36 X Q. Yourself and husband had always been upon the best of terms with your stepfather, had you not?

A. Yes, sir.

37 X Q. And you say Mr. Loeber never told you how much of your mother'- money he had received?

A. No, sir.

38 X Q. I understand you to say that you asked him how much he received. Will you please give his answer?

A. I have said before, we did not ask him how much he had received. We asked him how much mother had.

39 X Q. And he did not tell you that he had received it all, did he?

A. No, sir.

40 X Q. When did he tell you that he was pressed for money and your mother offered to loan him $8,000?

A. When he was in the act of building those houses, he said.

41 X Q. Did he tell you he received her money in one sum or at one time?

A. No, sir; he did not.

42 X Q. Did he tell you he had used the money received from her in improvement of his property by the erection of these houses?

A. Yes, sir; he had.

43 X Q. Did you know or did he tell you when those houses were begun or when they were finished?

A. No, sir; he did not.

44 X Q. And you were not certain until Mr. Loeber told you that he had received money from her that she did not possess the money at the time of her death?

A. No, sir; I wasn't certain until he told me that he had received it.

45 X Q. Your mother and Mr. Loeber lived happily together as husband and wife, did they not?

A. As far as I know, I think they did.

46 X Q. And your relations with your stepfather and his
29 relations with you and the rest of his stepchildren were always pleasant, were they not?

A. Yes, sir.

47 X Q. Your mother had great confidence in your stepfather, had she not?

A. Yes, sir.

48 X Q. You have said that your mother was not an extravagant woman. Was she a charitable woman?

A. I think she did what she could toward charity.

49 X Q. Was she in the habit of making presents?

A. Yes, sir; I think so, once in awhile.

50 X Q. You have said you thought she lived on the income of

that Eden-street house. Do you know what were the expenses of that house?

A. Not exactly; no, sir.

51 X Q. Do you know what was the net income of that house?

A. Not exactly; no, sir.

52 X Q. Do you know whether she put any improvements on that house during her widowhood or not?

A. If I remember, only once.

53 X Q. What was that?

A. Having some papering and painting done, that's all.

54 X Q. You do not know, then, the extent of those improvements or their cost?

A. No, sir; I do not.

55 X Q. Then you have no positive knowledge of how much your mother spent during her widowhood, have you?

A. No, sir.

56 X Q. She may have spent or given in charity or expended for presents a considerable sum during the eighteen months of her widowhood and you would know nothing of it?

A. I think if she would have spent a considerable sum I would have known of it.

57 X Q. Do you know how much of her own money she spent during the seven years and a half she was married to John Loeber?

A. No, sir; I do not.

58 X Q. You received $200 and your sister also received $200 for your shares in the Eden-street house from your mother's separate account, did you not?

A. I do not know from what account it came, but I know we got the $200.

59 X Q. And you each received your shares of your father's estate, did you not?

A. Yes, sir; we did.

60 X Q. Who received your brother's money?

A. I think my uncle did—uncle and mother together. They were both guardian over him.

61 X Q. And John Loeber never had that money, did he?

A. No, sir; he did not.

30 62 X Q. You have said in your examination that your mother received $7,300. State how you know that she received $7,300.

A. Being in the lawyer's office with her together.

63 X Q. Did you see the money paid to her?

A. Yes, sir; I did.

64 X Q. How was it paid—in cash or in check?

A. I think it was paid in money, for ours was all paid in money.

65 X Q. You have said you saw the money paid. Did you see the exact amount that was paid to her at that time?

A. I seen the money was paid to her, but didn't take notice the exact amount that was paid to her at that time, only but what I heard her say.

66 X Q. What did you hear her say at that time?

A. That she had received her money.

67 X Q. Then you only know that she received her share, but you do not know the exact amount?

A. As I have said before, I heard mother say that she had received that amount of money, but I don't know exactly how much she got after all was settled by paying the lawyer's fee.

68 X Q. Do you know where your mother kept her money?

A. I think it was in the savings bank, the Eutaw bank, and another German bank on Baltimore street.

69 X Q. From whom did you receive this information?

A. Hearing mother sometimes speak of the bank, I remember that much from it, and where father had his money I think she kept it.

70 X Q. Did Mr. Loeber tell you he had a right to do as he pleased with the money he had received from your mother?

A. Yes.

71 X Q. Did Mr. Loeber tell you that he paid your mother interest on the money he had received from her?

A. He did not.

72 X Q. Did he tell you that if he pleased he could leave all the money he had received from your mother to your brother Ernest?

A. Yes, sir; he did.

73 X Q. You say he told you if you made any fuss about it he would show you what he would do. Do I understand you to say or to mean that you had a fuss over it?

A. No, sir; we did not have a fuss—only the conversation we had the day we went out there.

74 X Q. You accused Mr. Loeber of having spent your brother's money, did you not?

A. I did not accuse him of having spent it; I accused him of having taken it.

75 X Q. But you were mistaken about that, were you not?

A. I do not think so; Mr. Loeber told me that he had brother's money.

76 X Q. But you have already said that your uncle, Philip
31 Rost, has your brother's money. It cannot be true that Mr. Loeber has it, can it?

A. I mean that he has the interest on brother's money; that's what he said he had, or had due bills to show.

77 X Q. Then you mean, not that he had your brother's money, but that he had the interest of your brother's money; is that correct?

A. Yes, sir; that he had taken the interest of my brother's money.

78 X Q. But you did think when you went out there that day that Mr. Loeber had also received the principal of your brother's money, did you not?

A. No, sir; I did not.

79 X Q. Do you know how Mr. Loeber received the interest of your brother's money?

A. Well, I don't know how he got it. I guess it had to be paid to him by the guardian.

80 X Q. Do you know how much your brother's income was in interest?

A. I think every year $200.

81 X Q. Your brother lived for seven years and a half with his stepfather, did he not?

A. He did.

82 X Q. Sent your brother to school, did he not?

A. Yes, sir; but he didn't cost him any school money; he went to the public school and didn't have to pay any.

83 X Q. And he clothed him during this time, did he not?

A. Yes.

84 X Q. And boarded him?

A. He did.

85 X Q. Was his stepfather kind to him or not?

A. I think he was.

86 X Q. How long after your mother's death before Ernest Rost, your brother, went to live with his sister?

A. I couldn't say the exact time; I think it's four or five months; I can't say exactly.

87 X Q. Did Mr. Loeber tell you and your husband that what your mother had he had?

A. Yes, sir.

88 X Q. And also told you that if he had died first your mother would have gotten it all back as well as her interest in his estate, or at least his will was made to that effect?

A. Yes, sir; it was.

89 X Q. Did he tell you his life was insured for a large amount for her benefit?

A. No, sir; he did not.

Redirect examination:

1 R. D. How old is your brother now?

A. 15 years.

32 By the EXAMINER: Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them or that may be material to the subject of this examination or the matters in question between the parties? If so, state the same fully and at large in your answer.

A. No, sir.

(Signature waived.)

AUGUST SCHRADER, a witness produced on behalf of the plaintiffs, being duly sworn on the Holy Evangely of Almighty God, deposeth and saith:

I live at No. 2920 Elliott street, Canton, and I am a druggist. I know the parties to this suit.

1 Q. I- what relation did you stand to the deceased, Mrs. Catherine Loeber?

A. I am a son-in-law, and married her daughter Amelia.

2 Q. For how long did you know Catherine Loeber during her lifetime?

A. I know her; made acquaintance with her in 1872, October. Her name was Catherine Rost at that time.

3 Q. When did you marry her daughter?

A. 1880.

4 Q. When did her former husband, Peter Rost, die?

A. He died in 1881, January.

5 Q. State whether or not you were present at the settlement of Peter Rost's estate.

A. Yes, sir.

6 Q. When and where did it take place?

A. I think it took place about six months after father's death, at the office of Mr. Benzinger.

7 *X* Q. How much money came to the widow at the time from her husband's estate?

A. I could not state the exact amount, but the estate, I think, amounted to $21,000. Of course there were some debts to be paid, funeral expenses, for cleaning purposes, tombstone, &c.; the charges of the orphans' court were taken off. (Objected to by Mr. Regester.) I think she received about $7,300 all clear, everything paid.

8 Q. Did she have any other estate besides her share of her husband's estate?

A. No, sir; not that I knew of then.

9 Q. Where did Mrs. Catherine Rost live after the death of her husband?

A. At first she lived at the old house on Eden St. and at one time she consulted my wife and said, I think—(objected to by Mr. Regester)—I'll rent my place. She lived partly in the house on Eden street; afterwards she moved to Mr. Schroeder's house, corner of Chase and Broadway, and partly she visited us. Of course she did not live with us; she came occasionally to visit us.

10 Q. Did she visit you for hours or for days or weeks?

A. For days and weeks.

33 11 Q. What were her expenses of living after the death of her husband and until she married again?

(Objected to.)

A. Judging from the mode of living, they were very slight.

12 Q. State about how.

A. Well, I don't think Henry Schroeder charged her any rent; she only lived in one or two rooms and she boarded herself.

13 Q. When did she die?

A. On the 28th day of January, 1890.

14 Q. When did you see her surviving husband, John Loeber, next after her death?

A. One day after her death, early in the morning, after breakfast. He sent for me on the day she died, but I was unable to go at once.

I went late at night. Mr. Loeber had already retired. After breakfast the following morning (I staid there all night) Mr. Loeber was sitting in his sitting-room, after I had my breakfast, and he approached me in the following manner, with tears in his eyes: He says, August, I am very sorry that this has happened to me, but, of course, it cannot be helped, meaning that mother had died. He then said, Leave everything the way as if mother was living; I cannot settle things now. He says, You see, pointing through the windows to those houses and improvements he made, I have $30,000 invested therein and if I sell now I have to do it at a loss, not realizing more than about $10,000 for it, meaning that the real estate was very cheap at that time. I agreed with him in this matter, but did not fully understand his meaning. My car was then approaching; it has to make a turn; you can see it from the place there, and I went away, telling him that I would be out shortly. I did go out the following Sunday—this was the following Sunday after the funeral—for the purpose of seeing what Mr. Loeber had to say to me. Mr. Loeber having company, he did not mention anything to me and neither did I. I went off without further knowledge of anything. When I said good night to Mr. Loeber I said, I will be out next Wednesday. He said, Do so. During the funeral one of our uncles, Mr. Salzer, when we passed those new buildings in the block coming from the funeral he told us that he had heard—(objected to by Mr. Regester). Before going out to see Mr. Loeber my wife and myself happened to be in the vicinity where Mr. Rost lives and we told Mr. Rost that I intended to see Mr. Loeber next Wednesday. We went to see Mr. Loeber about one week after mother died, in company with my wife. We both approached Mr. Loeber and told him that we had come to see if any settlement could be made about mother's affairs.

The taking of testimony was then adjourned to the 16th day of December, 1890, at three o'clock in the afternoon and the same place, at which time and place I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions—that is to say:

AUGUST SCHRADER resumed:

15 Q. State what conversation you had with Mr. Loeber one week after his wife died and you went to see him in company with your wife; state what was said by him, by you, and by your wife in his hearing and presence.

A. My wife asked him that we had come out to see about
34 mother's affairs, if any settlement could be made; he says, I did not marry you, I married Mrs. Rost; there is no need of any settlement, and what she had I have it. He then went on to tell us how he was pushed for money and in the act of borrowing money. Mother then should have said, Why not take my money and invest it in those ho-ses; it is at the savings bank and only brings me 3%. Then I said, Well, did you give mother any security? He said, no, that he made a will to the effect that if he should die

first that this money which he had invested for her should first come out of the estate and mother to receive her widow's part and the balance to be divided between the children; he did not state which children. I then mentioned, That is very good, but not sufficient security for all the money mother had; you may destroy the will if not record- it, or change it otherwise. Then Mr. Loeber asked of my wife, How much money did your mother have. Then her answer was, Between 9 and $11,000 with the house. Then Mr. Loeber says, This shows how much you know about it. I then asked him, How much did mother have? and he answers, $8,000 in cash. Then my wife says, I thought you didn't marry mother for her money, you had plenty of your own. Then he said, Do you think I am a fool—getting to be sixty-four years of age, marrying a woman and not have the good of her? Of course those words angered my wife very much, and in very hasty words she says, The worst blow of all is to think that you have taken Ernest's interest and charged it up for board. He says, Well, that was my own doings; I invested it for him to a better advantage and I owe Erny due bills for it; so asked him, Will you let us see those due bills. Then he said, Not until the proper time. This was before supper; then Mr. Loeber invited us to supper—that is, supper was ready—and we went into supper together; after Mr. Loeber was through supper he went out and I followed him in the sitting-room; I then mentioned, It's a pity that your best friend had to die; I says, Why didn't you tell us while mother was living what you had done; how glad would we have been to know, coming out here to see everything, that these rows of houses belonged to mother? He then said that one night on retiring they made all this out and promised not to say anything about it. Mother would have felt herself hurt, he said, if I would have offered any other kind of security only what I have already mentioned by the will; she always had confidence in me and knew I would do what was right by her children. If I am not mistaken, this was his own evidence at the orphans' court before the judges. He says, You have no right to this money nohow as long as I live; and then we had other conversations which I don't remember; this is the main things; we didn't stay very late that night.

16 Q. State whether or not there was anything said about the interest.

(Objected to as leading.)

A. I asked Mr. Loeber, Did you say anything about the interest this money would bring mother about paying her interest? He said no, that we had made up our minds to give up business altogether and to live of- off the income of the houses the balance of our lives.

17 Q. What did he say how he was pressed for money?

A. Well, he didn't say exactly how, but he was embarrassed to some extent, the way I understood it, and he wanted to borrow.

35 18 Q. What was said about administration, if anything?

A. No, sir; didn't say anything about administration.

19 Q. Did he or not say anything as to the time when your claims could be made?

(Objected to as leading.)

A. Yes, sir; he says, We have no right to do anything under twenty days.

20 Q. Describe the houses he pointed to.

A. Well, the houses which I mean are on the north side of the Frederick road, I think nine in number; if not mistaken, they are fourteen feet front, and the others are on Font Hill avenue, the road leading to the House of Refuge, eight in number, I think, and the frontage, I think, between twelve and thirteen feet; the depth I don't remember; I know the lots of the first houses which I have mentioned on the Frederick road are one hundred and forty-four feet.

21 Q. On whose ground are they erected?

A. On Mr. Loeber's ground; this ground was formerly a large hill and was leveled during the time mother was out there—after she married Mr. Loeber.

22 Q. Where is the property of Mr. Loeber situated on the Frederick road?

A. Right across from Gwinn's falls, this side of Mount Olivet cemetery.

23 Q. What is the boundary on the west?

A. Font Hill avenue.

24 Q. And the southernmost boundary?

A. The Frederick road.

25 Q. What is the depth of the lots fenced in with the houses on Font Hill avenue?

A. I don't remember the depth of those lots, but I do remember the depth of the others.

26 Q. When did you next see Mr. Loeber again, and what conversation did you have with him then?

A. I went to see Mr. Loeber in company with my brother-in-law, Mr. Schroeder, between three and four weeks after mother died; Mr. Loeber was not at home; we knew he had gone to town and we waited for him; we jointly *asked* Mr. Loeber that we had come out to see if he had made up his mind to give us a security; that the girls didn't want anything, just to secure to them their rights in case he should marry again or die, so we wouldn't have any trouble with his children; he positively refused to do anything unless he was compelled to; I did ask him several questions, what he would do if he was in our shoes, and he says he would do the same if he knew that he was right; then we talked about Ernest Rost, what should become of the boy, that we thought it would be advisable for us to take him away; says, Don't do that, don't do that; not later than the other day Erny was asking me, Papa, what shall become of me now, and then he said, Erny, you can stay with me as long as I have anything. I think that was all he said; what I remember anyhow.

36 27 Q. What did Mr. Loeber say about what estate his wife had left?

A. Well, he didn't say anything — what she had left; as I have already stated, he only said that mother had $8,000 in cash, and we took it for granted it was that amount she had when she married Mr. Loeber.

28 Q. What did he say had become of these $8,000 in cash?

A. As I have already stated, when he was pushed for money mother told him why not take my money and invest it, and no doubt this money was invested by Mr. Loeber.

29 Q. Invested where?

A. I think in those houses.

30 Q. Were you present when Mr. Loeber testified in the orphans' court?

A. Yes, sir.

31 Q. What did he say?

A. He said that mother had all confidence in him and she knew that he would do right by her children.

32 Q. What did he say as to the amount of money she had given him?

A. I think he said he didn't know of any amount of money.

33 Q. What did he say in the orphans' court in reference to a last will?

A. I don't remember what he said.

34 Q. How long was Mrs. Loeber sick in her last illness which ended with her death?

A. I think just fifteen days.

35 Q. When did you last see her prior to her death?

A. I went to see her several times during her sickness, but was not permitted to see her but once and that was in company with Mr. Loeber himself; I only had time to press her hands and told her I hoped she would soon get all right; had no other conversation with her.

36 Q. When he said to you that you anyhow had no claim on him as long as he was living, or unmarried, I believe, what claim did he mean?

A. Well, I don't exactly know what claim he could have meant; I suppose he thought if I marry a woman I marry everything; I have right to her, to what she has, as long as he lived.

(Objected to.)

Cross-examined.

By Mr. REGESTER:

1 X Q. You say John Loeber told you that his wife had $8,000 when she married him. Will you state whether John Loeber told you he had received $8,000 from her?

A. He did not state that he had received $8,000 from her.

2 X Q. Did he ever state to you or in your presence that he had received $8,000 from his wife?

A. No, sir; he did not.

37 3 X Q. You were present with your brother-in-law, Henry Schroeder, at a conversation had with Mr. Loeber, were you not?

A. Yes.

4 X Q. Did Mr. Loeber at that conversation state to you or to Mr. Schroeder that he had received $8,000 from his wife?

A. No.

5 X Q. Did Mr. Loeber at any time to you or in your presence say how much money he received from his wife?

A. He did not say how much he received; no, sir; he only said how much mother had.

6 X Q. Did you hear Mr. Loeber in the orphans' court say he did not know where his wife kept her money, nor the amount of money she had when she married him?

A. I think he didn't; I can't say positively; he said he didn't know of any money; as I have already stated, I don't remember; I don't think he did say that.

7 X Q. Did he not say in the orphans' court that he did not know the amount of money his wife had when she married him?

A. That is the same question; he said he didn't know.

8 X Q. Did he say in the orphans' court also that he did not know even at that time in what banks she kept her money at the time she married him?

A. I don't remember.

9 X Q. You say in your examination that you went with your wife to Mr. Loeber's house a week after his wife's death. Will you state the exact purpose for which you went?

A. We went to see about mother's affairs, paying a visit at the same time.

10 X Q. What demand or demands did you make on him?

A. We did not make any demands, only to ask for a security and to see if any settlement could be made.

11 X Q. Your wife has said that you did not know until Mr. Loeber told you that he had received any of her money?

A. No, sir; we did not know then.

12 X Q. How is — that you went there and demanded security for a sum of money, the amount of which you did not know?

A. We did not go there to demand a security; we only went there to see about mother's affairs, what settlement could be made, and Mr. Loeber says, I did not marry you; I married Mrs. Rost; there is no need of any settlement, and what she *has* I have it.

13 X Q. Then when he told you there was no need for any settlement what did your wife say, or you?

A. Well, Mr. Loeber then—my wife did not say anything as far as I can remember—Mr. Loeber then went on to tell us how he was pressed for money and in the act of borrowing money; mother then should have said, Why not then take my money and invest; it is in the savings bank and only brings me 3 %. Then I says, Well, this is not sufficient security for the money mother has; and he says, Well, we made a will. He then asked my wife, when I said

that is not sufficient security for the money mother had, How
38 much money did your mother have? and my wife replied, Between 9 and $11,000, with the house. He then said, This shows how much you know about it. I then says, How much did mother have? and he then mentioned the amount, $8,000 in cash; hence we know the amount mother had.

14 X Q. Then I understand you do not know the amount that Catherine Rost had when she married John Loeber of your own knowledge?

A. We knew that she inherited some money from her husband's estate—I think it was $7,300—and, as I found out, she had some money of her own in the savings bank, amounting to $1,600, which did not go to the orphans' court; those two amounts together made about $9,000, which she ought to have.

15 X Q. Then I understand you have made a calculation of the amount which she says she received from her husband's estate, and also $1,600 which you say she had in a savings bank of her own. Will you state how you know she got $7,300 from her husband's estate?

A. Her husband's estate, I think, was valued at about $21,000; the expenses taken off, also percentage taken off, left it about $1,000 less. Of this money she received her widow's part, and the rest was divided between the three children, Erny receiving $1,000 more for his education.

22 X Q. What portion of her husband's estate, which you say was $20,000 net, did the widow receive?

A. I think it was a little over $6,000; between 2 and $300 over; then she received her portion from the commission, amounting to $500; then she received, I think, a balance of nearly $300 from Mr. Benzinger, which amount he thought he couldn't exactly divide, and, as I heard, there was also some money in the house—I think about $400 in gold; this money was partly used in buying the girls some dresses—that is, the money in the house.

23 X Q. How do you know she received $6,200?

A. Mr. Rost's brother-in-law and myself went over the administration accounts.

24 X Q. How do you know she received $300 over and above her portion, and for what purpose was this $300 paid?

A. Mr. Rost was telling us that after all the settlement was made there was a balance of that amount and he didn't know how to divide it, and mother received it. I only know it from Mr. Rost.

25 X Q. How do you know that the commission amounted to $500?

A. Well, about $500; I think the commissions amounted to $1,090.

26 X Q. How do you know the amount of cash that was in the house at the time of Peter Rost's death?

A. Well, I heard that from my wife; I often heard her speak of it—what nice money mother received; ought to have been divided better.

27 X Q. Do you know whether or not Mr. Benzinger was paid out of the administrator's commissions?

A. Yes, sir; he was.

28 X Q. Then she co-ld not have received $500, could she?

39 A. Well, there was $90, some odd dollars more, over and above the $1,000.

29 X Q. Do you know how much Mr. Benzinger was paid?

A. I could not exactly say.

30 X Q. How do you know that Catherine Rost had $1,600 of her own money at the time of her husband's death?

A. I did not know it then.

31 X Q. How do you know now?

A. When we went over the administration accounts at Mr. Rost's he told us of this $1,600, and I asked him, How do you know about it? Then he told me that he went with mother to the savings bank about leaving the money there—I think the Savings Bank of Baltimore—and the president then said, If you take out your $1,600 under your own name I will keep the boy's money; and she drew it, and, together with Mr. Rost, they went to Mr. Spillman's German savings bank and deposited it there.

32 X Q. Then all you know of the $1,600 is what Philip Rost has told you?

A. Yes, sir.

33 X Q. Did John Loeber at the conversation you have referred to, in which you say he told you he was pushed for money, did he say when it was?

A. No, sir; he did not.

34 X Q. Did he tell you for what he needed the money?

A. Yes, sir; for building purposes.

35 X Q. Then did he tell you what year those buildings were begun?

A. He did not.

36 X Q. Were those buildings finished at the time of your mother-in-law's death?

A. I think they were.

37 X Q. How long?

A. That I couldn't exactly say; I knew they were finished, because he took us through them several times while mother was still alive and well. My wife jokingly said she would like to make one of those houses her home in the summer, because they were so nicely situated.

38 X Q. How long were Catherine Rost and John Loeber married before those buildings were begun?

A. Well, there were a few old buildings on the property—I think two or three, if not mistaken—about a year and a half after mother had married Mr. Loeber. They commenced then to reduce the hill. It was a large hill; the exact time, of course, I could not say, and commenced then to build the houses.

39 X Q. Do you or not know whether those buildings were begun prior to 1885?

A. I don't know.

40 X Q. Do you know the cost of those improvements?

A. I do not.

41 X Q. You say you went out there and said to Mr. Loeber that you would have been very glad to have known that those houses belonged to your mother-in-law. What ground had you for saying that those houses belonged to your mother-in-law?

A. Because he had always stated that he was pushed for money and would have to borrow, and took it for granted that mother's money was invested in those houses, and he said he had $30,000 invested in them, but he couldn't settle things now. If he would sell now he wouldn't realize but $10,000 for them.

42 X Q. But at this interview when he told you he had $30,000 invested in those houses he did not tell you that he had any of his wife's money invested there, did he?

A. No, sir.

43 X Q. Then, when you said to Mr. Loeber that you would have been glad to know that your mother owned those rows of houses you did not mean that she owned them, did you?

A. Well, partly; yes, sir.

44 X Q. You say Mr. Loeber told you that he and his wife had made an agreement to say nothing about the money to her children; am I correct?

A. No, sir; I didn't say that.

45 X Q. State what you did say in reference to that agreement.

A. I said, Why didn't you tell us what you have done? We would be glad to know that mother was the owner of those rows of houses; and then he says, one night on retiring we spoke about it, not to say anything about it. He did not say not to the children; he only said not to say anything about it, and he said mother had implicite confidence in him; that he would do what was right by the children; would have felt herself hurt if he had offered security. Then I said, What about the interest? He says, no, he did not make any agreement about interest at all. I intended to give up business and we will live off of them comfortably the balance of our lives; live of- off the interest of the investment because I asked him about the interest.

46 X Q. If he told you her money was invested in these houses why did he also tell you that she would be hurt if he asked for security; were these houses not sufficient security?

A. Yes, sir; sufficient security.

47 X Q. Why, then, did he tell you that she would feel hurt if he offered her security, and in the same breath tell you that he had invested her money in those houses without her knowledge?

A. Mother was a very kind woman, but at times she was very much afraid of her husband. He was cross with most every one, which I could see with my own eyes and hear with my own ears, but mother could get along with him well because she always gave in.

48 X Q. You have stated that those lots were 144 feet deep; will you state how you know this?

A. Well, I have heard them speak about it; heard it from little Ernest Rost; he was talking about it.

49 X Q. Then your knowledge of the size of these lots is only hearsay?

A. Yes, sir.

50 X Q. Mr. Loeber, I believe, is in business, is he not?

A. I don't know.

41 51 X Q. Mr. Loeber was in business during the lifetime of his wife, Catharine, was he not?

A. Yes, sir; dealer in live stock.

52 X Q. And at times Mr. Loeber requires considerable money in his business, does he not?

A. No doubt.

53 X Q. Did not at the conversation you have referred to Mr. Loeber tell you that he had lost considerable money a few weeks after his marriage?

A. Not that I know of.

54 X Q. Do you know whether he did say so to you?

A. He did not.

55 X Q. Did he tell you that he had borrowed any money from his wife?

A. Yes, sir.

56 X Q. You have stated that the offer of the money was a voluntary one upon the part of your mother-in-law?

A. Yes, sir; mother she told him why not invest mine in building.

57 X Q. Did Mr. Loeber tell you that he had received all of his wife's money and invested the same in those houses?

A. He did not.

58 X Q. And you are positive that he did not say to you or in your presence that he had invested $8,000 of his wife's money in those houses?

A. He did not state the amount he had invested. He said that mother had $8,000.

59 X Q. Then your brother-in-law is mistaken when he says that Mr. Loeber told him that he had invested $8,000 of his wife's money in these houses, was he not?

A. No doubt he misunderstood us if that was his evidence.

60 X Q. And you are positive Mr. Loeber did not say in the orphans' court that he had received $8,000 of his wife's money, are you?

A. I think so.

61 X Q. Did not Mr. Loeber deny positively in the orphans' court ever having borrowed one dollar from his wife?

A. I think so.

62 X Q. Did he not also in the orphans' court deny that he had ever invested or used a dollar of his wife's money in the erection of those houses?

A. I think so. He denied it.

63 X Q. Did he not also say in the orphans' court that his wife

had given him her money, and that he intended to do what was right, but that he did not propose to give a bond for $18,000?

A. Yes, sir.

The taking of testimony was then adjourned to the 23rd day of December, 1890, at two o'clock in the afternoon and the same place, at which time and place I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions—that is to say:

42 Mr. SCHRADER resumed:

64 X Q. How long after the death of his mother before Ernest Rost went to live with his sister?

A. I think between five and six weeks.

65 X Q. You have said that you were not allowed to see your mother-in-law during her last illness. Why was this?

A. Because she was very sick, very weak, and the least little noise might cause her death.

66 X Q. You heard everything that was said by John Loeber during the conversation in which your wife was present, and also during the conversation in which Henry Schroeder was present, did you not?

A. Yes, sir.

67 X Q. You said that John Loeber told you he intended to give Ernest back all the interest he had received. Did you demand that from him?

A. No, sir; we did not demand that; we only thought it was wrong that he had also taken Erny's interest and charged it up for board.

68 X Q. You have told everything substantially that was said in all of the conversations which you had with John Loeber while your wife was present and while Mr. Schroeder was present?

A. I think I have.

Redirect examination:

1 R. D. You state, in answer to your 1st cross-interrogatory, that Mr. Loeber did not state that he had received $8,000 from his wife. In answer to the 15th interrogatory-in chief you have testified that Mr. Loeber told you that all she, his wife, had he had, and that he further told you that she had $8,000 cash. How do you reconcile this conflict in your testimony?

A. When my wife and myself went to see Mr. Loeber to see what could be done about mother's affairs, if there was any settlement to be made, he used the following words: "There is no settlement to be made; I did not marry you; I married Mrs. Rost, and what she had I have it." Then he went on to tell us how he was pressed for money and in the act of borrowing money. Mother, then, should have said, Why not take my money and invest it in those houses; it is at the savings bank and brings 3%? and then I mentioned, Did you give mother any security for all the money she had? and he said it was not necessary, and he asked my wife, How much money did your mother have? and my wife replied, Between 9 and $11,000,

with the house. This shows how much you know about it, Mr. Loeber then says. I then enquired how much money did mother have, and he said $8,000 in cash; consequently we knew he must have received $8,000, because he says he has all what she has. Furthermore, he says, if you make much fuss about it I will give it all to Erny.

Question repeated.

A. I don't understand what you mean about that; what I have already stated.

2 R. D. In answer to the 12th cross-interrogatory, which is as follows (12th interrogatory read), you have said we did not go there to demand a security.

43 A. We only went out to see about mother's affairs—to see when a settlement could be made; did not demand any security then.

3 R. D. Did you demand any security at any other time?

(Objected to as not redirect examination.)

A. When I went out with Mr. Schroeder, my brother-in-law, we asked Mr. Loeber if he had made up his mind to give security; that the girls didn't want anything else while he was living, only to secure to them their rights in case he should marry again or die.

4 R. D. Who are the girls?

A. Her daughters.

5 R. D. There were several cross-interrogatories addressed to you relating to the testimony of Mr. Loeber in the orphans' court to which you answer, I think so. Please state what you mean by that.

(Objected to unless the questions are read to him.)

The attorney for the plaintiff then reads to the witness the 60th, 61st, and 62nd cross-interrogatories.)

A. During the time Mr. Loeber was giving his evidence, after I had finished giving mine, instead of I should have listened to what he had to say, my wife and Mr. Rost were talking to me and I did not hear all he said, whereas I would have remembered what he had to say; that's the reason I used those words, I think so. One thing I do remember: he gave his evidence that he would do what was right by her children.

6 R. D. Then your recollection of what took place in the orphans' court is not very clear?

A. No, sir; not very clear.

Cross-examined:

69 X Q. Have you read your examination that took place at the last sitting?

A. Yes, sir.

70 X Q. When?

A. I believe I read it right here to-day.

71 X Q. You have said, in answer to a question of Mr. Henninghausen's, that your memory of what was said in the orphans' court by Mr. Loeber is not very clear. Do I understand you to say that you have testified that you thought John Loeber said certain things of which you *know* say you know nothing?

A. No, sir; I can't swear to what he has said, because my attention was called away by some one else in the court-room.

72 X Q. But when you said, in answer to cross-questions which have been read to you, that Mr. Loeber had said those things in the orphans' court you thought that he actually did say them, did you not?

A. I ought — have said I didn't remember; it was my mistake in saying I think so.

73 X Q. Then I understand you to say that you have testified, in answer to cross-examination, that you thought he said something which you now say you don't know whether he said or not. Do I understand you correctly?

A. Well, I didn't think that I would have to remember all
44 that he said in the orphans' court; I thought that his evidence had been taken down and recorded.

By the EXAMINER: Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. Mr. Schroeder testified that when he and myself went out to see Mr. Loeber that Mr. Loeber had said he had received $8,000; I don't remember that he said that.

(Signature waived.)

The solicitors for the plaintiffs then filed with the examiner a certified copy of the 1st administration account in the estate of John P. Rost, and the same is returned, marked "Plaintiff's Exhibit Examiner No. 2."

CHARLES LIEPENKNECHT, a witness produced on behalf of the plaintiffs, being duly sworn on the Holy Evangely of Almighty God, deposeth and saith:

I live at No. 916 Edmonson avenue, and I a- treasurer of the German savings bank; I only know Mr. Schrader; I have seen Mr. Loeber.

1 Q. Please state whether or not Catharine Rost ever had any account in your bank.

A. She had; she had $2,587.06 on the 17th of May, 1882; on September 9th, 1882, she withdrew $587.06, and October 2nd, 1882, she withdrew $1,000, and October 9th she withdrew the balance of $1,000 and accrued interest of $31.30, and she closed the book.

Cross-examined.

By Mr. REGESTER:

1 X Q. Does that represent the whole account of Catharine Rost with your bank?

A. Yes, sir.

2 X Q. Had you at any time or have you now any account upon your books in the name of Catharine Loeber or of Catharine Loeber and John Loeber?

A. No, sir.

By the EXAMINER: Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. I do not know Catharine Rost, and I do not know Mrs. Loeber; I may have seen him, but I never spoke to the man in my life.

(Signature waived.)

MOZART W. HAYDEN, a witness produced on behalf of the plaintiffs, being duly sworn on the Holy Evangely of Almighty Go', deposeth and saith:

I am chief clerk at the Eutaw savings bank; I know Mr. Schrader' but don't know the other parties.

1 Q. Did Mrs. Catharine Rost in her lifetime deposit any money in your bank, and, if yea, what sums and at what times, and do you still have the money on deposit?

A. Yes; Catharine Rost did deposit on the 11th day of May, 1882, $4,923.10; on the 4th of August, 1882, she drew $200; August 14th, same year, $600; August 28th, same year, $1,000; November 9th, same year, $600; November 27th, same year, $700; December 15th, same year, $533; on the 18th of May, 1883, she drew $400, leaving a balance of $890.10; to this was credited interest, June 1st, 1883, $110.94; interest to June 1st, 1884, $29.73; interest to August, 1884, $5.13, making a balance of $1,035.90, which was withdrawn on the 2nd of August, 1884, and the account closed; all payments on this account were made to Catharine Rost personally.

2 Q. Please state whether Catharine Loeber had an account in your bank; and, if yea, state the deposits and withdrawals.

A. An account was opened on the 2nd of August, 1884, in the name of Catharine Loeber and John Loeber and the survivor of them, subject to the order of either, and the sum of $1,035.90, which was a balance of account No. 62694, which stood in the name of Catharine Rost, was deposited to their credit; on the 17th of December, 1884, $300 was withdrawn (Mr. Regester objects to stating anything as to the disposition of that fund); there was credited for interest to June 1st, 1885, $18.80; interest to June 1st, 1886, $22.47; September 3rd, 1886, $400 was withdrawn; October 15th, same

year, $200 was withdrawn; there was credited interest to June 1st, 1887, $10.19; interest to April 1st, 1888, $4.63; July 21st, 1888, there was withdrawn $50; there was credited interest to April 1st, 1889, $6.10; interest to April 1st, 1890, $5.80; interest to June 1st, 1890, 76c., and the balance of $154.65 was withdrawn June 4th, 1890; all payments made on this account, with one exception, were paid to Catharine Loeber personally, the exception being the balance of $154.65, which was withdrawn June 4th, 1890, closing the account, which was paid on the signature of John Loeber.

Cross-examined.

By Mr. REGESTER:

1 X Q. And I understand that the money to Catharine Rost's account on August 2nd, 1884, was not actually withdrawn from the bank, but transferred to the names of Catharine Loeber and John Loeber or the survivor, subject to the order of either?

A. Yes.

By the EXAMINER: Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. I don't know of anything more.

(Signature waived.)

The taking of testimony was then adjourned to the 9th day of March, 1891, at three o'clock in the afternoon and the same place, at which time and place I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions—that is to say:

SAMUEL MCD. RICHARDSON, a witness produced on behalf of the plaintiff, being duly sworn on the Holy Evangely of Almighty God, deposeth and saith:

46 I am president of the Savings Bank of Baltimore and I do not know the parties to this suit.

1 Q. Please state whether or not Catharine Rost, who afterward married John Loeber, ever kept a deposit of money in your bank; and, if yea, state the full particulars as far as you know.

A. Mrs. Catharine Rost, who was afterwards Mrs. Loeber, whose husband's first name I don't know, had an account at our bank; the account was opened March the 5th, 1879, with a deposit

of	$40 00
Same day, deposit	1,460 00
April 9th, deposit	40 00
May 2nd, deposit	40 00
June 2nd, deposit	40 00
July 2nd, deposit	40 00
August 9th, deposit	40 00

November 3rd, deposit		$40 00
April 1st, 1880, annual interest		66 53
		1,806 53
June 26th, 1880, payment		150 00
		1,656 53
January 22nd, 1881, payment		400 00
		1,256 53
April 1st, 1881, interest		63 20
		1,319 73
April 11th, payment		700 00
		619 73
April 30th, payment		150 00
		469 73
May 14th, same year, payment		50 00
		419 73
June 18th, payment		30 00
		389 73
October 6th, payment		25 00
		364 73
February 13th, 1882, deposit		20 00
March 14th, deposit		20 00
April 1st, interest		15 33
		420 06
May 11th, deposit		20 00
April 1st, 1883, interest		17 47
April 1st, 1884, interest		18 20
		475 73
47 April 3rd, deposit		20 00
April 1st, 1885, interest		19 75
		515 48
May 1st, 1885, interest		1 72
		517 20
May 3rd, paid in full		517 20

By the EXAMINER: Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them or that may be material to the subject

of this your examination or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. Nothing that I know of at all.

(Signature waived.)

The taking of testimony was then adjourned until Monday, March 16th, 1891, at the same place, at which last-mentioned time and place I attended and in the presence of the solicitors for the respective parties I proceeded to take the following depositions—that is to say:

ANTON ZIMMERMAN, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn, deposeth and saith as follows:

By the EXAMINER:

1 Q. State your name, residence, and occupation.

A. Anton Zimmerman; 977 Frederick avenue ext'd; contractor.

2 Q. Do you know the parties to this suit?

A. I know the defendant.

By Mr. REGESTER:

3 Q. State whether or not you graded a lot for Mr. Loeber; and, if so, where is the lot situated.

A. I did; it is situated between Gwinn's fall and Mount Olivet cemetery, fronting on Frederick road.

4 Q. Was or not that grading done under a contract in writing?

A. Yes, sir.

5 Q. Look at the contract now shown you, marked "Defendant's Exhibit Examiner No. 1," and state whether that is the contract under which this grading was done.

A. Yes, sir.

6 Q. This contract is dated the 3rd day of March, 1885; will you state when you began to grade under this contract and when you finished?

A. I began on the 3rd of March, 1885, and finished in May, 1885; I can't say what date in May.

7 Q. Was there or not at the time you began this grading any new buildings upon the lot belonging to Mr. Loeber, between where his residence stands and Font Hill avenue, on the Frederick road, or on Font Hill avenue?

A. No, sir.

8 Q. Will you state what buildings, if any, were on that
48 lot, and what was done with those buildings at or before the time when the lot was graded?

A. There was three old brick houses between his residence and Font Hill avenue and one little frame house on Font Hill avenue. Two of the old brick buildings were torn down after the grading. The other old brick building remains there yet and standing at the corner of Font Hill avenue and Frederick road. The frame building is also there, which is a one-story frame build-

ing, and stands fronting on Font Hill avenue about the middle of the lot.

9 Q. How long have you lived on the Frederick road?

A. All my life.

10 Q. How long do you remember this brick house you speak of on Font Hill avenue and Frederick road *been* there?

A. It has been there as far back as I can remember.

11 Q. Do you know who built the little frame house you speak of?

A. No, sir.

Cross-examination waived.

General question by the EXAMINER: Do you know or can you state any other matter or thing that may be to the benefit or advantage to the parties to this suit or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If so, state the same fully and at large in your answer.

—. No, sir.

THOMAS TUTTLE, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn, deposeth and saith as follows—that is to say:

By the EXAMINER:

1 Q. State your name, residence, and occupation.

A. Thomas Tuttle; No. 2 Young street, hauling and cellar-digging, &c.

2 Q. Do you know the parties to this suit?

A. I know the defendant.

3 Q. State whether or not you worked for Mr. Loeber upon a lot fronting on the Frederick road and Font Hill avenue adjoining his place of residence.

A. I dug four cellars in 1885. The fifth cellar I dug in 1886, and eight I dug between 1887 and 1889. I graded the lot up there at Mount Olivet.

4 Q. State whether or not at the time you dug the first four cellars there were any houses upon this lot and describe them.

A. There were three old brick houses on this lot. Two were torn down before I dug the cellars, and the one at the corner remains standing. There was a little one-story frame building fronting on Font Hill avenue, which is still standing there.

5 Q. What time in 1885 did you begin these four cellars you speak of?

A. In November.

49 6 Q. State whether or not at that time there were any new buildings erected upon that lot.

A. No, sir.

Cross-examined.

By Mr. HENNINGHAUSEN:

1 X Q. Where were the other cellars located that you dug?

A. Another one was on the same side of Frederick road, and the eighth was on Font Hill avenue.

General question by the EXAMINER: Do you know or can you state any other matter or thing that may be to the benefit or advantage to the parties to this suit or either of them or that may be material to the subject of this your examination or the matters in question between the parties? If so, state the same fully and at large in your answer.

A. No, sir.

(Signature waived.)

David M. Perregoy.

DAVID M. PERREGOY, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn, deposeth and saith as follows—that is to say:

By the EXAMINER:

1 Q. State your name, residence, and occupation.

A. David M. Perregoy; No. 7 Dorsey avenue; I am a carpenter and builder.

2 Q. Do you know the parties to this suit?

A. Only Mr. Loeber.

3 Q. State whether or not you were acquainted with the property owned by John Loeber on the Frederick road and on Font Hill avenue.

A. I am; I have known it upwards of fifty years.

4 Q. Have you or not erected on that lot any houses and how many you built and for whom?

A. In the first instance, about November, 1885, we built four brick houses and in 1886 one brick house, and I built four brick houses and two frame ones in 1887 and two brick houses in 1888. I built all these for Mr. Loeber, but he built six in the latter part of 1888 and 1889 which I had nothing to do with.

5 Q. At the time you began the erection of the first four brick houses what improvements, if any, were upon that lot?

A. Well, there were two brick dwelling-houses and another brick building known as "White Oak hall," now used as a store, and this little one-story frame concern on Font Hill avenue, and also a little one-story frame stable, a little dilapidated concern, which stood in the rear of Old White Oak hall. Mr. Loeber had these old buildings except the Old White Oak hall and the little one-story frame building torn down, and I used the suitable material in the erection of the first four houses.

6 Q. Do you know who built the little frame building you speak of?

A. No, sir.

50 7 Q. Do you know when this Old Oak Hall building was erected? If so, state the same.

A. It was built somewhere the latter part of the war—in 1863 or 1864—by Mr. Jeremiah Blanch.

8 Q. It was, then, on this lot before Mr. Loeber ever owned it?

A. It was; also the other two old brick houses.

Cross-examination.

By Mr. HENNINGHAUSEN:

1 X Q. Where were these houses built by you for Mr. Loeber located?

A. Located on the north side of Frederick road between 6th street and Font Hill avenue.

2 X Q. Were they all located on the Frederick road?

A. No, sir; nine located on the Frederick road and the two frame ones on Font Hill avenue, at the rear of White Oak hall, and two brick ones on the extreme northern end of Mr. Loeber's property adjoining the House of Refuge land.

3 X Q. How near is the eastmost house located to 6th street?

A. It is on the corner of 6th street and Frederick road.

4 — Q. Are these houses on Frederick road adjoining each other?

A. Yes, sir; the nine are.

5 Q. Please state the width of these nine houses on Frederick road.

A. About 12½ to 13 feet.

6 Q. State what is the depth of the lots of ground on which these houses are erected, appurtenant and used in connection with the respective houses as fenced in.

A. The depth will average at the corner of 6th street about 94 feet and runs back to a 16-foot alley, and the other are lots of irregular depths, binding on the road and on said 16-foot alley in the rear, and lessen in depth as they go westwardly.

7 Q. What is the distance from Font Hill avenue to the westernmost outline of the houses which front on Frederick road?

A. I could not give it to you correctly. There is a vacant lot there of 17 feet, and then this old store property at the corner, which is about 20 feet front.

8 Q. Then the westernmost building of the ninth house fronting on the Frederick road is about 37 feet from the northeast corner of Font Hill avenue and Frederick road?

A. Yes, sir.

9 Q. What is the size of the two building lots binding on Font Hill avenue adjoining the House of Refuge ground?

A. There is a vacant lot between these houses and the House of Refuge ground, but I can't tell you the front of the two lots.

10 Q. What is the front of the buildings on these lots?

A. I think about 16 feet.

11 Q. What is the depth of the yards appurtenant to the buildings, calculating the distance from the building on Font Hill Ave.?

A. I could not tell you.

51 12 Q. Is there an alley in the rear of these houses on Font Hill avenue; and, if so, what is the size of it?

A. There is an alley used as an entrance to the water works of Mr. Loeber, but the width of it I don't remember; it is sufficiently wide enough for a cart or wagon to go through it.

13 Q. Where are the other nine houses which were built in the years of 1888 and 1889 on Mr. Loeber's ground located?

A. Well, the two frame houses were situated on the east side of Font Hill avenue and on the north side of the alley at the rear of the nine that fronts — the Frederick road, and the other two I built I described before, adjoining the House of Refuge land; the other six are on the east of those two I built on the northern outline of Loeber's land on Font Hill avenue.

14 Q. On what street do they front, these six?

A. On the east side of Font Hill avenue.

15 Q. What is the respective fronts of those six houses?

A. I don't know; 12 feet, I suppose.

16 Q. *Is* the depth of the yards appurtenant of these six houses extend back to the alley you speak of?

A. Yes, sir.

17 Q. Does the 16-foot alley in the rear of the Frederick-road houses open into Font Hill avenue?

A. Yes, sir; Font Hill avenue and 6th street, and runs with the Frederick road.

18 Q. Then the first house is on the east side of Font Hill avenue and is at the northeast corner of this 16*th*-foot alley and Font Hill avenue?

A. The two frames houses are there.

19 *m x* Q. What are the sizes of those lots where the frame *home* are erected?

A. About 12 feet front each, and run back to a little three-foot private alley running equal with Font Hill avenue. I don't remember the depth of the lots.

General question by the EXAMINER: Do you know or can you state any other matter or thing that may be to the benefit or advantage to the parties to this suit or the matters in question between the parties or that may be material to the subject of this your examination? If so, state the same fully and at large in your answer.

A. No, sir.

(Signature waived.)

No other witnesses being named or produced before me, I then, at the request of the solicitors of the respective parties, closed the depositions taken in said cause and now return them closed under my hand and seal on this 14th day of April, in the year of our Lord eighteen hundred and ninety-one, at the city of Baltimore, in the State of Maryland.

A. DE R. SAPPINGTON, [SEAL.]
Examiner.

52 There are four exhibits with these depositions, to wit:

Plaintiff's Exhibits Examiner Nos. 1 and 2, Complainant's Exhibit J. H. S. No. 1, filed with the bill; Defendant'- Exhibits Examiner No. 1.

A. DE R. SAPPINGTON, *Examiner.*

I, A. de Russy Sappington, the examiner before whom the foregoing depositions were taken, do hereby certify that I was employed in assigning a day and taking the said depositions upon nine days, on eight of which I was employed by the plaintiff, and on one by the defendant.

A. DE R. SAPPINGTON, *Examiner.*

PLAINTIFF'S EXHIBIT EXAMINER P. R. No. 1. (Filed April 14th, 1891.)

6,675 18
1,600
700

8,975

PLAINTIFF'S EXHIBIT EXAMINER No. 2. (Filed April 14th, 1891.)

BALTIMORE CITY, *sct:*

The first account of Catherine Rost and Philip Rost, executors of the last will and testament of John Peter Rost, late of the city of Baltimore, deceased.

These accountants charge themselves with the inventory of the personal estate of the said deceased, returned on the first day of February, 1881, and amounting to	$20,605 00
And with interest on deposits in bank	1,283 32
	$21,888 32

And they crave an allowance for the following payments and disbursements, as per receipts appears:

Cash paid funeral expenses:		
M. Weber, undertaker	241 50	
Henry Fostman, shaving deceased	4 00	
Henry Berge, monument, &c.	495 00	
Dufur & Co., one wire settee	14 00	
"Correspondent," notice of death	1 25	
		$755 75
Cash paid Johnson & Prevost, appraisers		8 05
Do. do. "Correspondent," notice to creditors		4 50
Do. do. "Baltimore Sun," do. do.		4 89
Do. do. Mary A. Berger, 2 years' ground rent		25 00
Do. do. mayor and city council, water rent 1881		6 75
Do. do. do. do. do. taxes 1881		24 77

	Cash paid Dr. Aronsohn, medical attendance		17 00
53	Do. do. Michael Dean, emptying sink		3 00
	Do. do. M. J. Gorman, 1 hydrant		6 50
	Cash paid F. Kraus, repairs		4 00
	Do. do. Gissel & Decker, carpenter's work		105 44
	Do. do. Geo. Lipp, painting		25 00
	Do. do. Louis Orth, papering		21 20
	Do. do. register's fees for this account and copy		19 25
	These accountants' commissions on $21,888.32, @ 5%		1,094 41
	Amount forward		2,125 51
	Amount forward		2,125 51
	Allowed these accountants for the following property and cash delivered over to Catherine Rost, widow and one of these accountants, being in full of her share bequeathed to her by the will:		
	⅓ interest in a lot of ground and improvements beginning on the west side of Eden street — feet from the north termination or boundary line of lot of ground now or formerly owned by John Burger, in the city of Baltimore, known as "No. 164 Eden St.," valued @	300 00	
	And in cash the sum of	6,287 60	
			6,587 60
	Allowed these accountants for the following property and cash delivered over to Marie Schroeder, a daughter and one of the legatees under the will, viz:		
	⅓ of ⅔ interest in a lot of ground and improvements beginning on the west side of Eden street — feet from the north termination or boundary line of a lot of ground now or formerly owned by John Burger, in the city of Baltimore, and known as "No. 164 Eden street," valued at	200 00	
	And in cash the sum of	3,858 40	
	As per release filed and recorded		4,058 40
	Allowed these accountants for the following property and cash delivered over to Emilie Schroeder, a daughter and one of the legatees under the will, viz:		
	⅓ of ⅔ interest in a lot of ground and improvements beginning on the west side of Eden street — feet from the north termination or boundary line of a lot of ground now or formerly owned by John Burger, in the city of Baltimore, and known as "No. 164 Eden street," valued @	200 00	
	And in cash the sum of	3,858 40	
	As per release filed and recorded		4,058 40

Allowed these accountants for the following property and cash delivered over to Catherine Rost and Philip Rost, guardian of Ernst Rost, a son, and one of the legatees under the will, viz:

54	Amount forward		$16,829 91
	Amount forward		$16,829 91
	$\frac{1}{3}$ of $\frac{2}{3}$ interest in a lot of ground and improvements beginning on the west side of Eden street — feet from the north termination or boundary line of a lot of ground now or formerly owned by John Burger, in the city of Baltimore, and known as No. 164 "Eden St.," valued at	200 00	
	And in cash the sum of	4,858 41	
			5,058 41
	Estate accounted for		$21,888 32

BALTIMORE CITY, *ss:*

On the 8th day of May, 1882, came Catharine Rost and Philip Rost, executors as aforesaid, and made oath on the Holy Evangely of Almighty God that the aforegoing account is just and true as stated, and that they have paid or secured the payment of every sum or sums for which they crave an allowance, which, after examination, is passed by order of the orphans' court.

Test: ROBERT T. BANKS,
Register of Wills for Baltimore City.

In testimony that the aforegoing is a true copy taken from the original filed and remaining in the office of the register of wills for Baltimore city—

[SEAL.] I hereunto subscribe my name and affix the seal of my office this ninth day of May, 1882.

Test: ROBERT T. BANKS,
Register of Wills for Baltimore City.

DEFENDANT'S EXHIBIT EXAMINER No. 1. (Filed April 14, 1891.)

A Contract to Grade About 11,000 *Yards of Earth.*

An agreement of two parts as made this 3rd day of March, in the year 1885, by and between Antone Zimmerman, party of the first part, and John Loeber, party of the second part. The said party of the first part, in consideration of the sum of money to be paid as hereinafter provided, and the covenants and agreements hereinafter mentioned, does, for himself, his heirs and assigns, covenant, promise and agree, to and with the party of the second part, that he will, in a good and wor-manlike manner, do and perform the following work, that is to say:

The whole of said work is to be performed according to the grades established by the engineer's diagram hereunto annexed, and under

the supervision of the said party of the second part or his authorized agent, which survey and diagram form part of this agreement.

All said grading being about eleven thousand cubic yards of earth, which shall be completed on or before the 1st day of July, 1885, and no charge of any kind shall be made by the said party of the first part to the said party of the second part, beyond the sum of fifteen cents per cubic yard.

The payments to be made by the said party of the second part to the said party of the first part, as follows, that is to say: When one thousand cubic yards of earth shall have been graded, as shown by correct measurement, the party of the second part
55 shall pay to the party of the first part the amount due for the grading of the said one thousand cubic yards, less fifteen per cent., which fifteen per cent. shall be retained by the said party of the second part, as security for the completion of said contract according to the terms and covenants as hereunto agreed; and all payments thereafter shall be paid in like manner and conditions, until the whole grading shall have been completed according to the said engineer's diagram; and upon the completion of the said contract, according to all covenants and agreements contained therein, the party of the second part shall pay to the party of the first part the full amount of the fifteen per cent. so retained.

And it is further agreed by and between the parties to this contract, that only the grading from which the earth has been removed shall be measured or paid for; the said earth to be deposited at the place and in the manner as designated by the said engineer's diagram.

And it is expressly understood, that all the covenants and agreements are to be carried out to their honest intent. And it — further agreed, that the party of the first part shall pass his note, ($200) — hundred dollars, satisfactorily endorsed to the party of the second part, as security for the faithful completion of the within contract, and when the contract shall have been completed, as above agreed, then the said note shall be canceled by the party of the second part.

And it is further agreed, that if the party of the first — shall not complete the said contract at the time as heretofore set forth, he shall forfeit to the party of the second part his said note of two hundred —, amount of said fifteen per cent., and the party of the second part shall have the right, without hindrance or resorting to law, to make another contract for the completion of the said grading to whomsoever he may select.

In witness whereof, the aforesaid parties have set their hands and seals the day and year first mentioned above, to this and all other instruments.

ANTON ZIMMERMAN. [SEAL.]
JOHN LOEBER. [SEAL.]

Witness:
WM. H. TAYLOR.
EDWARD W. STEINUCKER.

Petition of Plaintiff for Leave to Amend Bill. (*Filed May 15th*, 1891.)

J. HENRY SCHROEDER, Administrator of Catherine Loeber, &c., *vs.* JOHN LOEBER. } In the Circuit Court No. 2 of Baltimore City.

To the hon. judge of said court:

The petition of J. Henry Sch-oeder, administrator, &c., the plaintiff in the above-entitled cause, most respectfully prays unto your honor for leave to amend his bill of complaint filed in the above cause by inserting therein an additional §, to be numbered § 4½, as follows:

And your orator further shows that said Catherine Loeber, during the period she was the wife of said John Loeber and
56 cohabiting with him as such and under the influence and control of her said husband, gave and entrusted her said husband with the sum of $8,000, being about eight-ninths of the corpus of her separate estate, without any consideration on the part of the husband to his said wife, and that said John Loeber, the defendant, received said money in trust for his said wife, and thereby became her trustee of her said separate estate of $8,000.

And that he may have leave to amend his prayer for relief in said bill by inserting in the beginning of his prayer that said defendant may be declared a trustee for the amount of money of the separate estate of his said deceased wife entrusted to him by her in her lifetime.

And as in duty bound, &c.

L. P. HENNINGHAUSEN,
Sol. for Pl'ff.

Decree. (*Filed May 21st*, 1891.)

JUSTIS HENRY SCHROEDER, Administrator, &c., Plaintiff, *vs.* JOHN LOEBER, Defendant. } In the Circuit Court No. 2 of Baltimore City.

This cause came on to be heard upon the bill, answer, testimony and exhibits, and all the proceedings were read and considered and arguments heard from counsel for both sides.

On consideration whereof, the court being of opinion that the plaintiff has no interest whatever in the matter in controversy—

It is thereupon this 21st day of May, A. D. 1891, adjudged, ordered, and decreed that the bill and all other proceedings thereunder be dismissed, but without prejudice to any proceedings the proper parties may be advised to take.

And it is further ordered that the plaintiff pay the cost.

C. E. PHELPS.

Order for Appeal. (*Filed June 25th*, 1891.)

J. HENRY SCHROEDER, Administrator of Cath. Loeber, Dec., Pl'tff, *vs.* JOHN LOEBER, Def'd. } In the Circuit Court No. 2 of Baltimore City.

Mr. Clerk:

Enter an appeal from the decree dismissing the bill of complaint in the above cause.

L. P. HENNINGHAUSEN,
Sol. for Compl't.

Which said appeal being by the court here also granted, it is thereupon ordered by our said court that a transcript of the record and proceedings in the case aforesaid be transmitted to the
57 court of appeals of Maryland, and the same is transmitted accordingly.

Test: JOHN H. SUTER, *Clerk.*

In testimony that the foregoing is truly taken from the records and proceedings of the circuit court No. 2 of Baltimore city aforesaid in the cause therein entitled I [SEAL'S PLACE.] hereunto subscribe my name and affix the seal of the circuit court No. 2 of Baltimore city aforesaid this ninth day of July, A. D. 1891.

JOHN H. SUTER,
Clerk of the Circuit Court No. 2 of Baltimore City.

On the 28th day of January, 1892, the following opinion and decree were filed:

In the Court of Appeals of Maryland, January Term, 1893.

J. HENRY SCHROEDER, Adm'r, *vs.* JOHN LOEBER.

Judge BRYAN delivered the opinion of the court:

Catherine Rost was a widow with two married daughters and a son about fifteen years of age. One of her daughters was married to J. Henry Schroeder and the other to August Schrader.

In August, 1882, she intermarried with John Loeber. She
58 died in January, 1890, and letters of administration on her estate have been granted to J. Henry Schroeder. At the time of her second marriage she was possessed of an undivided leasehold interest in a lot of ground in the city of Baltimore, and of a considerable sum of money.

The controversy in this case has arisen concerning this money.

The administrator of Mrs. Loeber filed a bill in equity against John Loeber praying that he might be decreed to pay this money into court for the benefit of the estate of the deceased, or that it might be declared to be a lien on certain real estate belonging to him, and for general relief.

The court below dismissed the bill. The evidence which connects Loeber with the receipt of the money consists entirely of an admission alleged to have been made by him. Mrs. Schrader, in answer to the twenty-eighth question, testifies that in a conversation between Loeber and her husband and herself "he (Loeber) stated
59 that there is no settlement to be made; that what mother had he had it; then he went off to tell us, and he told us he was pushed for money and in the act of borrowing money, and mother said, Why not take my money and put it in those houses and invest it for me, as it only brings three per cent. at the bank, and that way it will bring me more? My husband then asked, Did you not give her any writing or proof that she gave you the money? He said it was not necessary to give any writing, that he had made a will; that after his death the money that mother had loaned him should be paid out first to her after his death; then she should get her widow's share and the rest be divided among the children." In answering the twenty-ninth question she said, "My husband asked him, Well, how much money did mother have? Mr. Loeber said she had $8,000.00 in cash, was his answer. Then standing at the window in the sitting-room, pointing to the houses, he said that he had invested the money in those houses, and if I sell them now
60 I will lose too much money on them, but I intend to do what is right, he said. Then he said, We had no right to make any fuss about it; that he had a right to it as long as he lived, anyway."

On cross-examination she was asked this question: "Are you certain that Mr. Loeber told you he had borrowed money from his wife, or did he say she had given it to him?" And she answered, "I am certain he said he had borrowed the money and intended to give it to her back again." She was then asked, "And you are certain that he told you it was exactly $8,000.00?" and she answered, "Yes, sir; he said it was $8,000 in cash were the words that he used." August Schrader gives the same account of the conversation with Loeber as was given by his wife. This testimony was given in answer to the fifteenth direct question. He also says in the same answer, "I then asked him how much did mother have, and he answers eight thousand in cash." On cross-examination he said that Loeber did not state that he had received eight
61 thousand dollars from his wife. He said in another portion of his cross-examination that Loeber said he had borrowed money from his wife, and that Loeber did not state the amount he invested in the houses, but that he said Mrs. Loeber had eight thousand dollars. He also stated that in an examination in the orphans' court Loeber denied having borrowed any money from his wife. J. Henry Schroeder testifies that Loeber told him that he had received about eight thousand dollars from Mrs. Loeber. The

administration account of the estate of John P. Rost, Mrs. Loeber's first husband, was offered in evidence. From that it appears that she received in cash $6,287.60 and one-half of the commissions, she being administratrix, and Philip Rost, her brother-in-law, being administrator. Her half amounted to $547.20. All of the witnesses for complainant testify that she had, in addition to what she received from her husband's estate, sixteen hundred dollars in bank in her own name.

Philip Rost estimates the money which she had after re-
62 ceiving her share of her first husband's estate as amounting to $8,975.00; and the officers of three savings banks testify that at the time of her marriage to Loeber she had deposits in these institutions which amounted to nearly $8,000.00. These were all drawn out by Mrs. Loeber before her death, with the exception of $154.65, which was drawn out by Loeber after her death, the account having been previously transferred to the names of Catherine Loeber and John Loeber or the survivor. The sums drawn out amounted to a little more than $8,000.00, inasmuch as the deposits were increased by the accumulation of interest. The testimony of Mr. and Mrs. Schrader establishes the contract to our satisfaction. John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him. The contract was very indefinite in its terms; it is not stated in what manner the investment was to be made or on what conditions. It is probable that the parties had in mind the life estate which the husband would have in his wife's personalty in case he should survive her and that
63 they did not intend to change or impair it; but their notions on this subject were vague and inaccurate, and there is an absence of the certainty and precision on this point which are necessary to the formation of a contract. Moreover, the contract, so far as its terms are in any degree clear, was within the fourth section of the statute of frauds. It was a parol agreement for an interest in land. By its terms the money was to be invested in real estate, and it was therefore in direct conflict with the statute. Clabaugh and Landers *vs.* Byerly, 7 Gill, 362; Albert and Wife *vs.* Winn and Ross *et al.*, 5 Md., 77. But it does not follow that the wife ought to lose her money because of the invalidity of the contract for investment. Amidst the uncertainties surrounding the transaction it is distinctly shown that the money was not given to her husband, but that her interest in it was retained, and that it was their object to secure it by this investment. The contracts of a husband with his wife in reference to her separate property can be enforced
64 against him by her in equity when properly established. The circumstance that this contract was verbal did not extinguish her right to the money which she advanced to her husband in pursuance of it, and equity would give a remedy in a case of this description even between parties who were not married. In Green *vs.* Drummond, 31 Md., 71, a bill in equity was filed for the specific performance of a parol contract for the purchase of land jointly by two persons. The court refused specific performance because the

contract was within the fourth section of the Statute of Frauds; but, as the complainant had advanced a large amount of money on the faith of the parol contract, it was held that he was entitled to relief. The court said: "In this case it seems to us doubtful whether the appellant could by any proceeding at law recover the money paid and advanced by him under the contract, for there he would be met by the provisions of the statute, which would preclude him from giving evidence of such parol contract. The money
65 not being advanced as a loan to be repaid, but expended in pursuance of the agreement for the joint purchase of lands, in order to maintain an action at law to recover back the money it would be necessary to prove the contract under which it was paid, which he would be precluded from proving by parol by reason of the provisions of the statute, and thus his remedy at law might fail and justice be denied. 3 Rand., 259, 260; White, adm'x, *vs.* Coombs, ex'r, 27 Md., 489. In such case, according to the authorities, a court of equity ought to give relief, because there is no remedy at law, or a very inadequate and precarious one." And accordingly, although the complainant had no lien on the land, the court decided that he ought to have a decree for the amount of the money which he had advanced. We therefore think that the complainant is entitled to a decree for the amount of money received by John Loeber from his wife under the contract in question. Of course, Loeber will receive in the course of administration the share
66 of his wife's estate which belongs to him as surviving husband.

Mr. and Mrs. Schrader testified that Loeber said, "What his wife had, he had it," and that she had eight thousand dollars; and from this the inference is drawn that he received this amount from her. The other evidence in the cause shows that she had at least this much money, and we think it the just conclusion from the evidence that this was the sum which he received from her on the promise to invest in the houses.

We will reverse the decree of the circuit court and enter a decree in favor of the administrator of Mrs. Loeber for eight thousand dollars and costs in both courts.

Decree Reversed and Decree for Appellant.

Court of Appeals of Maryland, January Term, 1892.

67 J. HENRY SCHROEDER, Administrator of Catherine Loeber,
vs.
JOHN LOEBER.

The appeal in this case standing ready for hearing was argued by counsel for the respective parties and the proceedings have since been considered by the court.

It is thereupon, this twenty-eighth day of January, 1892, by the court of appeals of Maryland and by authority thereof, adjudged

ordered, and decreed that the decree of the circuit — No. 2 of Baltimore city, dated the 21st day of May, 1891, from which this appeal was taken, be, and the same is hereby, reversed; and it is further adjudged, ordered, and decreed that John Loeber pay to the appellant eight thousand dollars, and that he pay the costs in this court and in the said circuit court.

R. H. ALVEY.
JNO. M. ROBINSON.
68 LEVIN T. H. IRVING.
WM. SHEPARD BRYAN.
DAVID FOWLER.
JAS. McSHERRY.

Decree was reversed in this case on the 28th day of January, 1892, and decree that John Loeber pay to the appellant eight thousand dollars, and also pay the costs in this court and in the court below.

The following motion for reargument was filed on the fourth day of February, 1892:

In the Court of Appeals of Maryland.

J. HENRY SCHROEDER, Administrator, &c., }
vs. }
JOHN LOEBER. }

To the honorable the judges of said court:

The appellee, John Loeber, respectfully moves for a reargument of this case for the following reasons, to wit:

69 1st. Because the bill alleges a loan from Mrs. Loeber to the appellee, her husband, upon the undertaking and promise to repay the same to her children, but alleges no other contract or undertaking on his part; the complainant failed to prove the alleged contract, but did prove, in the opinion of this honorable court, another contract, viz., that "John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him," and this honorable court have decreed a repayment of the money received under this contract, and it is respectfully submitted that the court, through inadvertence, overlooked the fact that the latter contract, upon which its decree is based, is not alleged in the bill.

2d. Because the bill as it stands states no case within the jurisdiction of the court below or of this court on appeal therefrom.

And for other reasons to be assigned in the brief upon this motion.

SAMUEL REGESTER,
70 S. S. FIELD,
Sol'rs for Appellee.

Motion Overruled on the Seventh Day of April, 1892, and the Following Opinion Filed.

SCHROEDER
vs.
LOEBER.

Judge BRYAN delivered the opinion of the court:

In the brief filed by the appellee in support of the motion for re-argument, it is supposed that this court committed an error in founding its opinion on certain testimony which did not support the averments of the bill of complaint. It was said that the *allegata* and *probata* must correspond, and that in making a decree the court was confined to what was stated in the bill. The testimony in question was not excepted to, and this court was therefore bound to give effect to it. The 34th section of article 5 of the Code
71 provides as follows: "On an appeal from a court of equity no objection to the competency of a witness or the admissibility of evidence or to the sufficiency of the averments of the bill or petition or to any account stated and reported in said cause shall be made in the court of appeals unless it shall appear by the record that such objection was made by exceptions filed in the court from which such appeal shall have been taken." It is no matter whether the averments of the bill cover the case proved in evidence or not. We are obliged to decree according to the matters established by the proof. The section in the code is made up chiefly of the act of 1832, chapter 302, section 5. It has been frequently construed, and the practice under it is well established. In Harwood *et al. vs.* Jones, 10 Gill & Johnson, 419, this court said: "The decree of the county court, it is said, must be reversed on account of the variance between the allegations in the bill and the proofs in the cause. Whether there be such variance or not we have deemed it
72 unnecessary to inquire, because, according to our interpretation of the 5th section of the act of 1832, ch. 302, it is immaterial whether there exists such variance or not. No exceptions having been filed in the court below, either to the admissibility of the evidence or the sufficiency of the averments of the bill, the complainant is entitled to an affirmance of the decree in this court if warranted by the proof, whether his *allegata* and *probata* correspond or not." In Oliver *vs.* Palmer and Hamilton, 11 Gill and Johnson, 442, it was said:

"The second point of the appellants is, 'that neither the case stated in the bill nor the case attempted to be proved show any title in the complainants to the interposition of a court of equity. On the contrary, by their own showing they have ample remedy at law.' To escape from this objection the appellees have insisted that even if their bill be too inartificially drawn by reason of an insufficiency in its averments to entitle them to the relief they have sought, yet that, the proof in the cause having clearly established their right to the interposition of a court of equity, the appellants are by

the fifth section of the act of 1832, ch. 302, precluded from
73 urging as a ground of reversal any such defect in the bill; and if their assumption of the efficacy of the proof offered be correct we entirely concur in the position they have assumed. Being of opinion, as before stated, that not only by the broad and explicit language of the acts of 1825, ch. 117, sec. 2, and 1832, ch. 302, sec. 5, are final decrees under the first section of the act of 1820, ch. 161, embraced, but that upon the soundest principles of equity jurisprudence they ought so to have been. Does the proof show a case entitling the appellees to relief in equity is the matter to be inquired into." This latter case was cited and approved in Thomas *vs.* Doub, 1 Maryland, 327, and the same effect was given to the act of 1832 in Eyler and Matthews *vs.* Crabbs, 2 Maryland, 154. It is therefore very clear that it was our duty to consider the evidence and to make such a decree as it required without regard to the averments of the bill. It is also said that the contract stated in the bill was
74 not cognizable in equity, but was exclusively within the jurisdiction of a court of law. If we are bound to decree according to the proof this question is of little importance in this case.

It is alleged in the bill of complaint that Catherine Loeber loaned her husband eight thousand dollars on condition that he would pay the money after her death to her children. The contract was of the kind belonging exclusively to the jurisdiction of a court of equity. The death of the wife could not change its equitable character, but merely transmitted to another party the right of enforcing it. The executor or administrator succeeds to the right of action on personal contracts made with the deceased and must have the right to sue upon the one now in question before the tribunal having peculiar cognizance of causes of such a description. Of course the contract enured to the benefit of the children of the deceased wife, and if they had seen fit they might have brought suit in their own names and superseded the right of action in the adminis-
75 trator. The authority of Owings *vs.* Owings, 1 Harris & Gill, 484, is fully acknowledged and that of subsequent cases on the same point. The children were the beneficiaries of the contract and as such were entitled to maintain it before the appropriate tribunal and to control the litigation respecting it; but surely the party to whom the promise was made on valuable consideration could sue for a breach of it, and this right of action would devolve upon her representative. There can be no conflict of interest in cases of this nature. The party to whom the promise is made is simply a trustee for those beneficially interested. His suit is prosecuted for their benefit and is subject to their control. We have not overlooked the statutory enlargement of the jurisdiction of courts of law in matters relating to husband and wife. In Barton *vs.* Barton, 32 Maryland, 214, it was decided that a widow might maintain an action at law against the executors of her deceased husband on a contract made with him during coverture concerning
76 her separate estate. This would show that an action at law might be brought on the contract averred in the bill, but it

is well settled that the jurisdiction of equity is not ousted by a statute which gives a court of law power over the same subject. This was decided in Barnes and Fergusson *vs.* Crain, 8 Gill, 398, and is the established doctrine.

As the statute required that we should make our decision on the evidence in the case without regard to the averments in the bill of complaint, it would have been useless to remand the cause for the purpose of amending the pleading.

Motion overruled.

Order for *fi. fa.* filed on the 26th day of April, 1892, and issued on the 28th day of April, 1892, returnable to the circuit court No. 2 of Baltimore city.

On the 18th day of June, 1892, the following transcript from the circuit court No. 2 of Baltimore city was filed, to wit:

77 In the Court of Appeals of Maryland.

Writ of Exception *from the Court of Appeals of Maryland.*

Received April 28th, 1892, and same day delivered to the sheriff of Baltimore city.

MARYLAND, *sct:*

The State of Maryland to the sheriff of Baltimore city, Greeting:

Seal Court of Appeals, Maryland.

Whereas at a circuit court No. 2 of Baltimore city, begun and held at the court-house, in and for Baltimore city, on the second Monday in May, in the year of our Lord one thousand eight hundred and ninety-one, wherein J. Henry Schroeder, administrator of Catherine Loeber, was plaintiff and John Loeber was defendant; and whereas the said circuit court No. 2 of Baltimore city passed a decree in favor of the said John Loeber and against the said J. Henry Schroeder, administrator of Catherine Loeber, and from which said decree the said J. Henry Schroeder, administrator, &c., appealed to the court of appeals of Maryland, as appears by inspection of the record of proceedings thereof, which was lately caused to be brought before the said court of appeals of Maryland, at the city of Annapolis, for certain causes of error in the same to be corrected; and whereas, at a court of appeals begun and held at the city of Annapolis on the second Monday in January, in the year of our Lord one thousand eight hundred and ninety-two, it was considered by the said court that for sundry errors in the record of proceedings aforesaid, and also in the passing of the decree aforesaid, that the same decree be reversed, annulled, and held entirely as void, and it was further adjudged, ordered, and decreed that the said John Loeber pay to the appellant the sum of eight thousand dollars, with interest thereon from the 28th day of January, 1892, until paid; it was also considered by the said court that the said J. Henry Schroeder, administrator, &c., recover against the said

John Loeber as well the sum of one hundred and ten dollars and five cents, costs in the said circuit court No. 2 of Baltimore city, as also the sum of one hundred and eighty-eight dollars and twenty cents, costs in the court of appeals of Maryland, adjudged unto him upon the reversal of said decree for his costs and charges by him put to about the prosecution of the appeal aforesaid of and upon the premises: Therefore you are hereby commanded that of the goods and chattles, land, and tenements of the said John Loeber being in your bailiwick you cause to be made the debt, costs, and charges aforesaid, and have you those sums of money before the said circuit court No. 2 of Baltimore city, to be held at the city of Baltimore on the second Monday in May next, to render unto the said J.
78 Henry Schroeder, administrator, &c., the debt, costs, and charges aforesaid. Hereof fail not at your peril and have you then and there this writ.

Witness the Honorable Richard H. Alvey, chief judge of the said court of appeals, the fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Issued the 28th day of April, 1892.

J. FRANK FORD,
Clerk Court of Appeals for Maryland.

L. P. HENNINGHAUSEN,
M. R. WALTER, *Attorneys.*

Proceedings "stayed" and writ returned by order of circuit court No. 2 of Baltimore city.

ISAAC S. SANNER, *Sheriff.*

Motion to Quash Writ. (*Filed April 29th*, 1892.)

J. HENRY SCHROEDER, Administrator, &c.,
vs.
JOHN LOEBER.

John Loeber, the defendant in the above-entitled cause, by S. S. Field and Samuel Regester, his solicitors, moves the court to quash the writ of execution issued in this case for the following reasons:

1. Because the said writ is void.
2. Because the decree upon which said writ was issued is void.
3. Because by the said writ (unless quashed) the defendant will be deprived of property without due process of law.
4. Because said decree deprives the defendant of property without due process of law.
5. Because said writ was issued in violation of the Constitution of the United States and amendments thereto and the laws passed by Congress in pursuance thereof.
6. Because said decree was passed in violation of the Constitution of the United States and amendments thereto and the laws passed by Congress in pursuance thereof.

7. Because said writ was issued in violation of the fourteenth amendment to the Constitution of the United States.

8. Because said decree was passed in violation of the fourteenth amendment to the Constitution of the United States.

9. Because the said decree was passed without any jurisdiction in the court rendering the same.

10. Because the said court has no jurisdiction upon the case made by the bill.

79 11. Because the said decree deprives the defendant of property as relief upon a matter as to which defendant never was called upon to answer and which he had no opportunity to deny or disprove.

12. Because section 34 of article 5 of the Code of Public General Laws, in so far as it requires the court of appeals to make their "decision on the evidence in the case without regard to the averments of the bill of complaint," is contrary to the Constitution of the United States and amendments thereto and laws passed in pursuance thereof, and is therefore void.

13. Because said statute of Maryland is contrary to the fourteenth amendment to the Constitution of the United States, and is therefore void.

14. Because neither the said statute nor any other law of Maryland required or authorized the court of appeals to pass the said decree.

15. Because said court was forbidden to pass said decree by section 36 of article 5 of the Code of Maryland.

And for other reasons apparent upon the face of the record.

Wherefore he prays for an order directing the sheriff of Baltimore city to return immediately into this court said writ and his proceedings thereunder, and that the said writ may be quashed, and for such order as may be proper in the premises.

SAMUEL REGESTER,
S. S. FIELD,
Solicitors for Def't Petitioner.

Order upon Foregoing Motion. (*Filed April 29th*, 1892.)

J. HENRY SCHROEDER, Administrator, &c., *vs.* JOHN LOEBER.	In the Circuit Court No. 2 of Baltimore City.

Upon the foregoing motion and petition, it is ordered, this 29 day of April, in the year 1892, by the circuit court No. 2 of Baltimore city that the sheriff of Baltimore city be, and he is hereby, ordered to return the writ of *fiere facias* issued in the above-entitled case, together with his proceedings thereunder, immediately before me, the judge of said court, and that the third Monday of May, in the year 1892, be, and it is hereby, fixed for a hearing of the said motion and petition and adjudication thereon; provided a copy of this order be served upon the plaintiff or his attorney on or before

the 1st day of May, 1892; and it is further ordered that proceedings under said writ be stayed pending the hearing of this motion and petition.

C. E. PHELPS.

Service of copy of order of court admitted by Isaac S. Sanner, sheriff of Baltimore city, on the 29th day of April, 1892, at 11.05 o'clock a. m.

80 Copy of the within order of court served on Louis P. Hennighausen, plaintiff's attorney, on the 29th day of April, 1892, in presence of William H. Johns.

Copy of the within order of court served on J. Henry Schroeder the 30th day of April, 1892, in presence of Frank A. Walvington.

ISAAC S. SANNER, *Sheriff.*

Sheriff's fee ---------- $1 50

Order of Court Overruling Motion to Quash Fiere Facias and Dissolving Injunction. (*Filed May* 21*st*, 1892.)

J. HENRY SCHROEDER, Adm'r, &c., *vs.* JOHN LOEBER. } In the Circuit Court No. 2 of Baltimore City.

The motion and petition of the defendant to quash the writ of *fi. fa.* heretofore issued in this case and the preliminary order and injunction passed thereupon, coming on to be heard, was argued by counsel; on consideration *of* whereof the court doth, this 21st day of May, 1892, order that the order and injunction passed thereupon be dissolved, and that the said motion be overruled.

DAN'L GIRAUD WRIGHT.

Order for Appeal. (*Filed May* 21*st*, 1892.)

J. HENRY SCHROEDER, Adm'r, *vs.* JOHN LOEBER. } In the Circuit Court No. 2 of Baltimore City.

Mr. Clerk:

Please enter an appeal from the order passed in this — on the 21st day of May, 1892.

S. S. FIELD,
SAMUEL REGESTER,
Solicitors for Defendant, John Loeber.

Sworn to in open court May 21st, 1892.

Approved appeal bond, filed May 23d, 1892.

Which said appeal being by the court here also granted, it is thereupon ordered by our said court that a transcript of the

81 record and proceedings in the case aforesaid be transmitted

to the court of appeals of Maryland, and the same is transmitted accordingly.

Test: JOHN H. SUTER, *Clerk.*

In testimony that the foregoing is truly taken from the records and proceedings of the circuit court No. 2 of Baltimore city aforesaid in the cause therein entitled—

[PLACE OF SEAL.] I hereunto subscribe my name and affix the seal of the circuit court No. 2 of Baltimore city aforesaid this first day of June, A. D. 1892.

JOHN H. SUTER,
Clerk of the Circuit Court No. 2 of Baltimore City.

82 And on the 18th day of November, 1892, the following opinion and order were filed, to wit:

JOHN LOEBER
vs.
J. HENRY SCHROEDER.

Judge FOWLER delivered the opinion of the court:

This — the second appeal growing out of the litigation between the appellant and the appellee, and the question now presented is alleged to be a Federal one. There are other questions argued and suggested in the elaborate brief filed by the appellant, but we think they have been already disposed of by the opinions of this court in the former appeal and on the motion for rehearing thereof. In order to ascertain the question presented for our consideration we shall state briefly the history of the cause which resulted in the decree now complained of. J. Henry Schroeder, administrator of Catherine Loeber, filed a bill in the circuit court No. 2 of Baltimore city, praying that her husband, John Loeber, the appellant
83 in this, should be decreed to pay into court a sum of money amounting to $8,000, which was claimed as part of her estate, or that it might be declared to be a lien on certain real estate belonging to the appellant, and for general relief. The appellant here, who was defendant and appellee in the case just mentioned, answered and excepted to the bill in that case, and it was dismissed by the lower court on the ground that the appellee here, who was the sole defendant and appellant in the former case, as administrator, had no interest in that litigation. He then appealed from the decree dismissing his bill, and this court reversed that decree and entered a decree in his favor as administrator of Mrs. Loeber for $8,000. A motion was filed for reargument, and it was suggested as one of the principal grounds for said motion that this court must have overlooked the fact that the contract upon which they had undertaken to decree had not been alleged in the bill; but we held, over-
84 ruling the motion, that, "it was no matter whether the averments of the bill cover the case proved in the evidence or not, we are obliged to decree according to the matter established by the proof;" and for this position we relied upon section 34 of ar-

ticle 5 of the Code, which is a codification of the act of 1832, chapter 302, section 5, as interpreted by this court for more than half a century. That provision, so far as it relates to the question we are considering, is as follows: "On an appeal from a court of equity no objection to the competency of a witness or the admissibility of evidence * * * shall be made in the court of appeals, unless it shall appear by the record that such objection was made by exceptions filed in the court from which such appeal shall have been taken." In the case of Harwood *vs.* Jones, 10 Gill & Johns., 419, which was decided in 1839, Dorsey, J., in delivering the opinion of the court, used this language: "The decree of the county court, it is said, must be reversed on account of the variance between the allegations of the bill and the proof in the cause. Whether there be such variance or not, we
85 have deemed it unnecessary to inquire, because, according to our interpretation of the fifth section of the act of 1832, chapter 302, it is immaterial whether there exist such variance or not." This construction of the provision of our code referred to has been recognized and adhered to in a number of cases which are cited and relied upon by Bryan, J., who delivered the opinion of this court on the motion for reargument made by this appellant in the case of Schroeder *vs.* Loeber at April term last and reported in 24 Atlantic Reporter, 226.

A final decree having then been entered in this court in favor of the appellee, as administrator of Mrs. Loeber, he caused an execution to be issued thereon, returnable to circuit court No. 2 of Baltimore city, and upon its return there a motion was filed by the appellant, Loeber, to quash the writ because both the decree and the writ are void; and, as we understand it, the contention is that the decree (and, of course, the writ of execution) is void because the act of assembly (Code, art. 5, sec. 34) as
86 interpreted by this court is in violation of that part of the 14th amendment of the Constitution of the United States which declares that no "State shall deprive any person of property without due process of law;" and it was very earnestly contended that this provision of the code as construed is liable to this objection because by its authority this court undertook to decree upon a matter not alleged in the bill.

We shall confine our attention to this question, all the other questions suggested or discussed by the appellant on this appeal having been, as we have said, fully disposed of heretofore on the former appeal and motion for rehearing.

After quoting the definition of "due process of law" when applied to judicial proceedings as defined by the Supreme Court of the United States in Pennoyer *vs.* Neff, 95 U. S., 733, namely, that it means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights,"
87 a number of cases of high authority are quoted to give emphasis to the long-established rule that a judgment or decree must be responsive to the issues presented by the pleadings.

Of course we do not deny the binding force of these authorities, for they are founded upon broad views of common justice and equity; and we fully agree that no man should be condemned or deprived of his property without a full opportunity to be heard, and that "a judgment of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other *in any other* tribunal." Windsor *vs.* McVeigh, 93 U. S., 274. But a moment's consideration will show that this is not the character of the decree complained of. The appellant, Loeber, had a full opportunity to meet the case made by the proof offered by Schroeder, administrator, in the court below, and if he thought the tes-
88 timony on which we based our decree was inadmissible under the allegations of the bill he had the right to except to such testimony, and thus exclude it from our consideration. But instead of availing himself of this statutory right or of the opportunity to produce countervailing proof, which he now says he could have produced, to disprove the case made by the appellee, the appellant determined to rely upon a strictly technical defence, namely, that the appellee had no interest whatever in the matter in controversy. We held to the contrary and proceeded to dispose of the case upon the testimony before us; and, as we have said, we are unable to perceive in what manner this section of our code or our construction thereof violates the provisions of the fourteenth amendment of the Constitution of the United States. The appellant knew, or ought to have known, when he failed to except to the testimony on which we based our decree that this court, according to the rules and settled course of chancery practice in Mary-
89 land, would give that testimony its full weight, whether it was responsive to the issue made by the pleadings or not, and that the real issue in every equity cause is, by virtue of art. 5, sec. 34, of the Code, the issue made by the evidence and not that made by the pleadings.

Order affirmed.

Court of Appeals of Maryland, October Term, 1892.

JOHN LOEBER
vs.
J. HENRY SCHROEDER, Administrator, &c.

The appeal in this case, standing ready for hearing, was argued by counsel for the appellant and the proceedings have since been considered by the court. It is thereupon, this eighteenth day of November, 1892, by the court of appeals of Maryland and by
90 the authority thereof, adjudged and *and* ordered that the order of the circuit court No. 2 of Baltimore city, dated the

21st day of May, 1892, from which this appeal was taken, be, and the same is hereby, affirmed with costs.

R. H. ALVEY.
JNO. M. ROBINSON.
WM. SHEPARD BRYAN.
JAS. McSHERRY.
CHARLES B. ROBERTS.
DAVID FOWLER.

Order affirmed with costs by the court on the 18th day of November, 1892.

On the 5th day of January, 1893, was filed the following petition for a writ of error, to wit:

In the Court of Appeals of Maryland.

JOHN LOEBER, Appellant,
vs.
J. HENRY SCHROEDER, Administrator of Catherine Loeber, Appellee.

91 To the Honorable Richard H. Alvey, chief judge of the court of appeals of Maryland:

The petition of John Loeber respectfully shows:

I.

That heretofore, to wit, July 12, 1890, J. Henry Schroeder, administrator of Catherine Loeber, the above-named appellee, filed his bill in the circuit court No. 2 of Baltimore city against John Loeber, the above-named appellant.

II.

That said circuit court No. 2 was and is a court of equity, having no jurisdiction at law.

III.

That said bill alleges that the deceased, "Catherine Loeber, offered to him a loan of eight thousand dollars, part of her own separate estate aforesaid, on condition that he should pay the said sum of money on and after her death to her said children, saying at the time that she had full trust and confidence in him that he
92 would pay and divide said money among her children after her death and do what was right by the children, and the said John Loeber agreed to take said money under said conditions as a loan from his said wife, and the said eight thousand dollars were then and there in fact loaned by the said Catherine Loeber to her said husband, John Loeber, under the conditions aforesaid." Said bill elsewhere alleges that said Catherine left surviving her

three children, naming them, by a former husband. (Orig. Rec., p. 1.)

IV.

That said bill does not allege that "John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him," nor does it allege that he received her money under any trust, understanding, agreement, or promise other than his undertaking or promise to repay to her children after her death.

V.

That said John Loeber answered said bill denying its allegation above quoted and including in his answer two exceptions to
93 the bill: first, that the case stated was at law, and said circuit court No. 2 had no jurisdiction; and, secondly, that the complainant had no interest in the case stated, being simply a debt due the children.

VI.

That by the laws of Maryland any objection to a bill made in the answer has the same effect as if made by plea or demurrer.

VII.

That, testimony having been taken, said circuit court No. 2, Phelps, J., at the hearing dismissed the bill upon the second exception thereto in the answer.

VIII.

That, upon appeal, the court of appeals, at the January term, 1892, reversed said decree, and, finding from the testimony that "John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him," said court of ap-
94 peals proceeded to pass a decree against said John Loeber for eight thousand dollars, the amount which said court found from the testimony he had received from his wife under such undertaking to invest for her.

IX.

That said decree was not based upon anything alleged in the bill, but was based upon a matter not alleged in the bill, but found by said court in the testimony, no exceptions having been filed to said testimony, and said court of appeals declared in the opinion filed at the April term, 1892, and again in the decision rendered at the October term, 1892, to reverse which a writ of error is sought, that art. 5, sec. 34, of the Code of Public General Laws of Maryland "required that we should make our decision on the evidence in the case without regard to the averments in the bill of complaint;" that said statute authorized and directed the passage of said decree, and that said statute is not repugnant to the XIV
95 amendment to the Constitution of the United States.

X.

That upon said decree a writ of *fi. fa.* was issued, returnable to the circuit court No. 2 aforesaid, in which court the said John Loeber promptly moved to quash the writ on the grounds, among others, that said decree and said statute are both and each contrary to the XIV amendment to the Constitution of the United States, but said circuit court No. 2 passed an order overruling said motion, from which said John Loeber duly appealed to the court of appeals of Maryland, and said court of ap-, at the present (October) term, 1892, passed its decree affirming said order, deciding "that the real issue in every equity cause is, by virtue of art. 5, sec. 34, of the Code, the issue made by the evidence and not that made by the pleadings;" that said statute is valid, and that said decree was passed under its authority and is valid.

96 XI.

That said decree last passed is a final decree of the highest court of the State of Maryland; that said decree and decision involved the question of the validity of a statute of Maryland on the grounds of its being repugnant to the XIV amendment to the Constitution of the United States, and also the question of the validity of authorities exercised under said State, to wit, said writ of *fi. fa.* and the authority of said court to pass the decree upon which said writ was issued on the ground of their being repugnant to said fourteenth amendment; and also the question of the right, claimed by the said John Loeber under said amendment, of being informed, by means of allegations in the bill, of the matter charged against him before being answerable therefor in a court of equity, and also the question of the right or immunity claimed by the said John Loeber under the said amendment that he should not be deprived of his property
97 by means of a writ of *fieri facias*, itself void and issued upon a void decree, as he claimed, and said decision was against the said rights and the said immunity so claimed by the said John Loeber under the said amendment, and said decision was in favor of the validity of said statute and said authorities so assailed by him as repugnant to said amendment.

XII.

That said John Loeber claimed the right under said amendment to the benefit of that long-established, invariable, and universal rule of chancery that a court of equity can decree only upon the allegations in the bill, and that said statute, in so far as it attempts to abolish said rule and in so far as it deprived him of said right, was contrary to said amendment and void; but said decision of the October term, 1892, was against the right so claimed and in favor of the validity of said statute.

98 Therefore he prays your honor to allow a writ of error from the Supreme Court of the United States, to approve his bond

tendered for the purpose of a supersedeas, and to sign a citation to the appellee.

SAMUEL REGESTER,
S. S. FIELD,
Sol'rs for Petitioner.

The above petition is granted and a writ of error is allowed as therein prayed.

R. H. ALVEY,
Chief Judge of the Court of Appeals of Md.

On the 5th day of January, 1893, was filed the following assignment of errors, to wit:

In the Supreme Court of the United States.

JOHN LOEBER, Plaintiff in Error,
vs.
J. HENRY SCHROEDER, Administrator of Catherine Loeber, Defendant in Error.

99 At the same time with his petition for a writ of error to the decree passed by the court of appeals of Maryland in the above-entitled cause at the October term of said court, A. D. 1892, the said John Loeber files the following assignment of errors:

1. That in the hearing and decision of the cause between the above-named John Loeber, appellant, and the above-named J. Henry Schroeder, appellee, in the court of appeals of Maryland, being the highest court of said State, at the October term thereof, in the year 1892, there was drawn in question the validity of a statute of Maryland, to wit, a portion of section 34 of article 5 of the Code of Maryland, on the ground of its being repugnant to the fourteenth amendment to the Constitution of the United States, and the said court decided in favor of the validity of said statute, and in so doing erred.

100 2. That by the invariable and universal rule of chancery a court of equity can decree only upon the allegations of the bill, and the said John Loeber claimed in the said cause at the said October term, 1892, that the benefit of this rule was one of the privileges or immunities guaranteed to him by said fourteenth amendment, and the said court of appeals by refusing to quash the writ of *fi. fa.* issued upon a decree which had been passed upon a matter not alleged in the bill decided against the privilege or immunity so claimed under said amendment, and in so deciding said court acted in professed obedience to and upon the supposed authority of said statute, Code, art. 5, sec. 34, in violation of that clause of said amendment which says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and in so doing said court of appeals erred.

3. That said defendant in error filed his bill against said plaintiff

in error, John Loeber, in the circuit court No. 2 of Baltimore
101 city, a court having jurisdiction only in equity; said court dismissed the bill. Upon appeal, the bill not having been amended, the court of appeals of Maryland passed a decree against said John Loeber for eight thousand dollars, which decree was not based upon anything alleged in the bill and was "entirely aside of the issue raised in the pleadings." Upon said decree a writ of *fi. fa.* was issued; said John Loeber promptly filed a motion to quash said writ on the grounds that said decree had been passed and said writ issued in violation of said fourteenth amendment, and that said decree and writ were void for other reasons set out in said motion, but said court of appeals at said October term, 1892, passed its decree refusing to quash said writ, and in so doing erred.

4. That upon the point being distinctly and properly presented to said court of appeals in said cause at said October term, 1892, that said John Loeber was about to be deprived of his prop-
102 erty by means of said writ of *fi. fa.*, which writ was void, and therefore not "due process of law," said court refused to quash said writ, and in so doing erred.

5. That upon the point being distinctly and properly presented to said court in said cause at said term that said John Loeber was about to be deprived of his property by means of said writ, issued upon a decree which had been passed upon a matter not alleged in the bill, a matter of which he had never been informed and which he had never been called upon to answer by any allegation in the bill or other pleading, and that said proceedings were without due process of law, the said court sustained said proceedings, and in so doing erred.

6. That in sustaining said proceedings and refusing to quash said writ said court of appeals acted in professed obedience to said statute, Code, art. 5, sec. 34, deciding that said statute directs
103 said court, on appeals in equity, to decree upon the evidence, if no exceptions thereto are filed, "without any regard to the averments of the bill;" that under said statute "the real issue in a chancery cause is that made by the evidence and not that made by the pleadings," and that under said statute the defendant was bound, at his peril, to have found out from the testimony offered by the complainant the matter charged against him, there being no allegation thereof in the bill; and upon the point being distinctly and properly raised in the said cause said court decided that said statute thus construed is not repugnant to said fourteenth amendment, and in so doing erred.

7. That in the said cause at said term before said court there was drawn in question the validity of an authority exercised under the State of Maryland, to wit, said writ of *fi. fa.*, on the ground of its being repugnant to said fourteenth amendment, and the said court decided in favor of the validity of said writ, and in so
104 doing erred.

8. That at the same time and place there was drawn in question the validity of an authority exercised under said State, to

wit, the authority of said court to pass said prior decree upon which said writ was issued on the ground of its being repugnant to said amendment, and said court decided in favor of the validity of said authority, and in so doing erred.

9. That there are other errors in said decree of the October term, 1892, to be hereafter assigned in the brief.

Wherefore said John Loeber prays that said decree of the court of appeals of Maryland, passed in said cause at the October term, 1892, to wit, November 18th, 1892, may be reversed.

SAMUEL REGESTER,
S. S. FIELD,
Sol'r's for Plaintiff in Error.

105 On the 10th day of January, 1893, was filed the following writ of error, to wit:

UNITED STATES OF AMERICA, *ss:*

[The Seal of the Circuit Court, Maryland.]

The President of the United States of America to the honorable the judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of Maryland, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Loeber, appellant, the defendant below, and J. Henry Schroeder, administrator of Catherine Loeber, deceased, appellee, the complainant below, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or
106 wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John Loeber, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
107 United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme

Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the sixth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland.

Allowed by—
R. H. ALVEY,
Ch. Judge C't App'ls, Md.

[The Seal of the Circuit Court, Maryland.]

108 On the 11th day of January, 1893, was filed the following bond, to wit:

Know all men by these presents that we, John Loeber and David M. Peregoy, Casmer Vogel, and Albert E. Lewis, as sureties, are held and firmly bound unto J. Henry Schroeder, administrator of Catherine Loeber, deceased, in the full and just sum of sixteen thousand dollars, to be paid to the said J. Henry Schroeder, administrator as aforesaid, his successor or successors, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the court of appeals of Maryland, to wit, the October term for 1892, in a suit depending in said court between John Loeber, appellant, and J. Henry Schroeder, adminis-
109 trator as aforesaid, appellee, a decree was rendered against the said John Loeber, and the said John Loeber having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said J. Henry Schroeder, administrator as aforesaid, citing and admonishing him — be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John Loeber shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN LOEBER. [SEAL.]
DAVID M. PEREGOY. [SEAL.]
CASMER VOGEL. [SEAL.]
A. E. LEWIS. [SEAL.]

Sealed and delivered in presence of—
JOHN GENSLER.

Approved by—
R. H. ALVEY,
Ch. Judge C't of Appeals.

110 MARYLAND, }
Baltimore City. }

I hereby certify that on this ninth day of January, 1893, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, personally appeared David M. Peregoy, one of the within-named obligors, and made oath in due form of law that he is worth five thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

And at the same time personally appeared Casmer Vogel, one of the within-named obligors, and made oath in due form of law that he is worth over six thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

And at the same time personally appeared Albert E. Lewis, the remaining within-named surety, and made oath in due form of law that he is worth five thousand dollars in real estate over and above his just debts and liabilities.

JOHN GENSLER, *J. P.*

111 STATE OF MARYLAND, }
Baltimore City, } *sct:*

I hereby certify that John Gensler, Esquire, before whom the annexed affidavits were made and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

Seal of the Superior Court of Baltimore City, in the 8th Judicial Circuit of Maryland.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 10th day of January, A. D. 1893.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

On the 24th day of January, 1893, the following citation was filed, to wit:

UNITED STATES OF AMERICA, *ss:*

112 The President of the United States to J. Henry Schroeder, administrator of Catherine Loeber, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland wherein John Loeber is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, chief judge of the court of appeals of Maryland, this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

R. H. ALVEY,
Ch. Judge C't of Appeals.

113 STATE OF MARYLAND, *City of Annapolis,* } *To wit:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, at Annapolis, in obedience to the mandate of a writ of error awarded by the Honorable Richard H. Alvey, chief judge of the court of appeals of Maryland, bearing date the 6th day of January, 1893, do hereby certify that the foregoing record is a true transcript of the records and proceedings in the case of John Loeber *vs.* J. Henry Schroeder, administrator of Catherine Loeber, as the same remains on file in the clerk's office of the said court of appeals; and I do further certify that the said court of appeals is the highest court of law or equity in said State in which a decision can be had in said case; and I do further certify that the foregoing bond in said record is a true copy of the bond in said case, which was filed in my office on the 11th day of January, 1893.

And I do further certify that the foregoing writ of error in said record is a true copy of said writ awarded by the said the
114 Honorable Richard H. Alvey, chief judge as aforesaid, to the judgment of said court, and I herewith transmit the original of said writ; and I do further certify that a copy of said writ was duly filed in my office for the State of Maryland on the 10th day of Jan'y, 1893.

And I do further certify that the copies of the opinions of the court of appeals in said record are true copies of the same as rendered by said court in said case and on file in my office, and that said decree in said court of appeals in said case was rendered on the 18th day of November, 1892.

And I do further certify that the petition, assignment of errors, and citation, as aforesaid, are true copies of the same and on file in my office.

Seal Court of Appeals, Maryland.

In testimony whereof I have hereunto subscribed my name as clerk of the said court of appeals of Maryland, and affixed the official seal of said court, at my office, in Annapolis, Maryland, on the 1st day of February, A. D. 1893.

115

J. FRANK FORD,
Clerk Court of Appeals, Maryland.

Cost of transcript, $24.00, paid.

Endorsed on cover: Case No. 15,250. Maryland court of appeals. Term No., 1280. John Loeber, plaintiff in error, *vs.* J. Henry Schroeder, administrator of Catherine Loeber, deceased. Filed February 3rd, 1893.

Supreme Court U. S.
FILED.
MAY 1 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

TERM No. 1280. OCTOBER TERM, 1892.

JOHN LOEBER, *Plaintiff in Error,*

vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF DEFENDANT IN ERROR ON HIS MOTION TO DISMISS OR AFFIRM.

L. P. HENNIGHAUSEN,
M. R. WALTER,
Counsel for Defendant in Error, for the purposes of this Motion.

Seal Court of Appeals, Maryland.

In testimony whereof I have hereunto subscribed my name as clerk of the said court of appeals of Maryland, and affixed the official seal of said court, at my office, in Annapolis, Maryland, on the 1st day of February, A. D. 1893.

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J. FRANK FORD,
Clerk Court of Appeals, Maryland.

Cost of transcript, $24.00, paid.

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IN THE

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TERM No. 1280. OCTOBER TERM, 1892.

JOHN LOEBER, *Plaintiff in Error*,

vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased.

In Error to the Court of Appeals of the State of Maryland.

MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

Comes now the defendant in error, by his counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause, for want of jurisdiction:

1. Because the order of the Court of Appeals of Maryland simply affirms an order overruling a motion to quash an execution, to which a writ of error will not lie, as it is not a "final judgment or decree" within the meaning of the judiciary act.

2. Because no Federal question is involved.

3. Even if a Federal question be involved, the order of the Court of Appeals of Maryland can be supported on other grounds.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the order, to review which said writ of error was issued, because, though the record may show that this Court has jurisdiction in the premises, the questions upon which the jurisdiction depends are so frivolous as to need no further argument.

LOUIS P. HENNIGHAUSEN,
M. R. WALTER,
Counsel for Defendant in Error, for the purposes of this Motion.

To WILLIAM COLTON, ESQ.,
Counsel for Plaintiff in Error, in the above entitled cause.

Please take notice, that on Monday the first day of May, 1893, at the opening of the Court, or so soon thereafter as counsel can be heard, the motion to dismiss or affirm, of which the aforegoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed is a copy of the brief to be submitted with the said motion in support thereof.

L. P. HENNIGHAUSEN,
M. R. WALTER,
Counsel for Defendant in Error, for the purposes of this Motion.

Service of copy of the above motion and notice, and of brief, admitted this 8th day of April, 1893.

WILLIAM COLTON,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

TERM No. 1280. OCTOBER TERM, 1892.

JOHN LOEBER, *Plaintiff in Error,*

vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF DEFENDANT IN ERROR ON HIS MOTION TO DISMISS OR AFFIRM.

STATEMENT.

On July 12, 1890, the defendant in error filed his Bill of Complaint in Circuit Court No. 2 of Baltimore city, against the plaintiff in error, in which, among other things, he alleged:

That Catherine Loeber died January 28, 1890, leaving surviving her, her husband (the plaintiff in error,) and four children by a former marriage. That at the date of her marriage with John Loeber, on August 10, 1882, she was possessed of an undivided seven-ninths of a lot of ground in fee in Baltimore city, and of about nine thousand dollars in cash; that shortly after their marriage, John Loeber, being desirous of improving a vacant lot of ground in Baltimore city, which he owned, and being in need of money, his wife, Catherine, offered to lend him, and that he accepted from her

as a loan, the sum of eight thousand dollars, on condition that he should repay it, and which he agreed to repay, on and after her death, to her said children. (Record, pages 4 and 5.) That the $8,000 were paid to the plaintiff in error on the terms aforesaid, and that he thereupon erected a number of houses on his said lot, using and applying that money thereto, and that he had not repaid said loan or any part of it. The bill concluded with a prayer that the said plaintiff in error be directed and required to bring said money into Court, to be invested in the name of the estate of said deceased, under the statute, for his life, or that said loan may be declared to be a lien on his said property, payable to the defendant in error on his, the said John Loeber's, death, and for other and further relief.

The plaintiff in error was duly summoned, employed counsel and filed his answer, (Record, pages 6 and 7,) in which he denied that he had ever borrowed "$8,000 or any other sum or sums of money from his said wife, upon the conditions or under the circumstances set forth" in the bill, "or upon any conditions or under any circumstances," or that it was used or invested in the improvement of said vacant land or any land, or that said "money or ony part of it was used for such improvements or any part of them," or "that his wife ever loaned him any money for that purpose or for any other purpose."

The plaintiff filed the general replication, (Record, page 8,) and testimony was then duly taken by both sides. (Record, pages 8 to 53.)

On the 21st day of May, 1891, Circuit Court No. 2, after argument by counsel for the respective parties, passed a decree dismissing the bill. From this decree an appeal was taken by the defendant in error to the Court of Appeals of Maryland, which Court, on the 28th day of January, 1892, reversed the decree of the lower Court and entered a decree against John Loeber and in favor of the defendant in error, for $8,000 and costs. (Record, page 58.) In its opinion (pages 55 to 58) the Court says, (Record, page 57): "The testimony of Mr. and Mrs. Schroeder establishes the contract to our satisfaction. John Loeber undertook to invest his

wife's money for her benefit in certain houses which belonged to him * * but that the contract was very indefinite in its terms * * it is not stated in what manner the investment was to be made or on what conditions. Moreover, the contract, so far as its terms are in any degree clear, was within the 14th section of the Statute of Frauds. It was a parol agreement for an interest in land." "But it does not follow that the wife ought to lose her money because of the invalidity of the contract for investment. Amidst the uncertainties surrounding the transaction it is distinctly shown that the money was not given to her husband, but that her interest in it was retained, and that it was their object to secure it by this investment. The contracts of a husband with his wife, in reference to her separate property, can be enforced against him by her in equity when properly established. The circumstance that this contract was verbal did not extinguish her right to the money which she advanced to the husband in pursuance of it, and equity would give her a remedy in a case of this description, even between parties who are not married." "We therefore think the complainant is entitled to a decree for the amount of money received by John Loeber from his wife, under the contract in question."

On the fourth of February, 1892, the plaintiff in error filed in the Court of Appeals of Maryland a motion for re-argument, alleging the following reasons, to wit:

1st. Because the bill alleges a loan from Mrs. Loeber to John Loeber, upon the undertaking and promise to repay the same to her children, but alleges no other contract or undertaking on his part.

2d. Because the bill as it stands states no case within the jurisdiction of the Court below or of this Court on appeal therefrom. (Record, page 59.)

This motion was, on April 7, 1892, overruled, for the following reasons, as set forth in the Court's opinion, (Record, pages 60, 61, 62):

'In the brief filed by the appellee in support of the motion for re-argument, it is supposed that this Court committed an error in founding its opinion on certain testimony which did

not support the averments of the Bill of Complaint. It was said that the *allegata* and *probata* must correspond, and that in making a decree the Court was confined to what was stated in the bill. *The testimony in question was not excepted to, and this Court was therefore bound to give effect to it.*'

The 34th section of article 5 of the Code, provides as follows:

'On an appeal from a Court of Equity, no objection to the competency of a witness or the admissibility of evidence, or to the sufficiency of the bill or petition, or to any account stated and reported in said cause, shall be made in the Court of Appeals, unless is shall appear by the Record that such objection was made by exceptions filed in the Court from which such appeal shall have been taken.'

"It is no matter whether the averments of the bill cover the case proved in evidence or not. We are obliged to decree according to the matters established by the proof. This section in the Code is made up chiefly of the Act of 1832, ch. 302, sec. 5. *It has been frequently construed, and the practice under it is well established.*" The Court of Appeals then refers to the case of Harwood vs. Jones, 10 Gill and Johnson, 419, *decided at the December Term*, 1839; Oliver vs. Palmer, 11 G. & J., 442, decided December, 1841; Thomas vs. Doub, 1 Md. 327, decided December Term, 1851, and Eyler vs. Crabbs, 2 Md. 154, decided June Term, 1852, in all of which cases that construction was placed upon the Act of 1832. "It is therefore very clear," the Court of Appeals goes on to say, "that it was our duty to consider the evidence and to make such a decree as it required without regard to the averments of the bill."

In reference to the second reason of the plaintiff in error for a re-argument, viz: that the bill states no case within the jurisdiction of the Court below, or of the Court of Appeals, the Court of Appeals says: (Record, page 61.)

"If we are bound to decree according to the proof, this question is of little importance in this case. It is alleged in the Bill of Complaint that Catherine Loeber loaned her husband $8,000, on condition that he should pay the money after her death to her children. The contract was of the kind belonging exclusively to the jurisdiction of a Court of Equity.

The death of the wife could not change its equitable character, but merely transmitted to another party the right of enforcing it. The executor or administrator succeeds to the right of action on personal contracts made with the deceased and must have the right to sue upon the one now in question before the tribunal having peculiar cognizance of causes of such description."

On April 28, 1892, a writ of *fi. fa.* on the decree was issued, upon the order of the defendant in error, returnable to Circuit Court No. 2 of Baltimore city; and on the 29th day of April, 1892, the plaintiff in error moved to quash the writ for the reason, amongst others, that said decree was passed, and the said writ of *fi. fa.* was issued, in violation of the Constitution of the United States and Amendments thereto. This motion, after hearing, was overruled by Circuit Court No. 2 of Baltimore city. From this order an appeal was taken to the Court of Appeals of Maryland, which latter Court, on November 18, 1892, affirmed the order of the Circuit Court No. 2. (Record, page 68.) In its opinion (Record, pages 67–68) the Court says: "As we understand it the contention is that the decree (and, of course, the writ of execution) is void because the Act of Assembly (Code, Art. V, section 34,) as interpreted by this Court, is in violation of that part of the 14th amendment of the Constitution of the United States, which declares that 'no State shall deprive any person of property without due process of law;' and it was very earnestly contended that this provision of the Code, as construed, is liable to this objection, because by its authority this Court undertook to decree upon a matter not alleged in the bill." * * * "But a moment's consideration will show that this is not the character of the decree complained of. The appellant, Loeber, had a full opportunity to meet the case made by the proof offered by Schroeder, administrator, in the Court below; and if he thought the testimony on which we based our decree to be inadmissible under the allegations of the bill, he had the right to except to such testimony, and thus exclude it from our consideration. But instead of availing himself of this statutory right or of the opportunity to produce countervailing proof, which he now says he could have

procured, to disprove the case made by the appellee, the appellant determined to rely upon a strictly technical defence, namely, that the appellee had no interest whatever in the matter in controversy. We held to the contrary and proceeded to dispose of the case upon the testimony before us; and, as we have said, we are unable to perceive in what manner this section of our Code, or our construction thereof, violates the provisions of the fourteenth amendment of the Constitution of the United States. The appellee knew or ought to have known when he failed to except to the testimony on which we based our decree, that this Court, *according to the rules and settled course of Chancery practice in Maryland*, would give that testimony its full weight, whether it was responsive to the issue made by the pleadings or not, and that the real issue in every equity cause is, by virtue of art. 5, sec. 34 of the Code, the issue made by the evidence and not that by the pleadings."

On January 5, 1893, the said Loeber sued out a writ of error. The errors assigned are substantially these, (pages 69-74):

I. That section 34 of Article 5 is repugnant to that clause of the Constitution of the United States which provides that no State shall deprive any person of property without due process of law."

II. Because sec. 34 of Art. 5. is in violation of that clause of the 14th amendment, which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Argument.

I.

This Court has no jurisdiction of the writ in this case, and it should therefore be dismissed:

1. Because a writ of error will not lie to an order overruling a motion to quash an execution. A decision of the Court

upon a rule or motion, is not "*a final judgment or decree in any suit,*" &c., within the meaning of the Judiciary Act. The refusal to quash is not "a judgment, much less is it a final judgment."

Boyle vs. Zacharie, 6 Peters, 657.
McCargo vs. Chapman, 20 Howard, 556.
Early vs. Rogers, 16 How. 597.
Amis vs. Smith, 16 Peters, 314.
Evans vs. Gee, 14 Peters, 2.

2. On the first appeal, the Court of Appeals decided that, as the plaintiff in error had not in the Court below excepted to the testimony in the case, it had the right under the Act of the General Assembly of Maryland of 1832, (now section 34 of article 5, of the Code of Public General Laws of Maryland) to decree according to the matters established by the proof. That Court (as well as the lower Court) had jurisdiction of both the subject-matter and of the parties, *and the decree passed by it was within the relief prayed.* The matter was therefore *res adjudicata*, and the decree cannot be collaterally attacked. The question of the unconstitutionality of sec. 34, of article 5 should have been, and could only be, raised on the first appeal, and a writ of error then sued out, if the plaintiff in error desired the decree reviewed by this Honorable Court. Having failed to do this, the validity of that decree cannot again be inquired into. The decision of the Court of Appeals upon the second appeal can therefore be supported upon this ground alone—which does not involve the fourteenth amendment of the Constitution of the United States.

3. The testimony which the plaintiff in error thinks the Court of Appeals of Maryland should not have considered on the first appeal, not having been excepted to in Circuit Court No. 2 of Baltimore City, the latter Court had, according to general equity practice, (independently of statute) the right to consider it even if it was not strictly admissible under the allegations of the bill. The Act of 1832, does nothing more than provide that exceptions to the testimony shall not be made for the first time in the Court of Appeals; in other

words, that only the questions raised and decided below shall be heard by that Court. We do not see what the fourteenth amendment of the Constitution has to do with an Act regulating the practice in Maryland in reference to the evidence to be considered by the Court of Appeals on appeal.

II.

But if this Court should be of opinion that the Federal question is properly before it, then we ask that *the order of the Court of Appeals of Maryland be affirmed, because the question on which the jurisdiction depends is so frivolous as not to need further argument.*

As the plaintiff in error was duly summoned, appeared, answered, took testimony, argued the case, had a full opportunity to meet the case made by the proof offered by Schroeder in the Court below, and if he thought that any of the testimony was inadmissible under the allegations of the bill, had the right to except thereto and have it excluded from the consideration of the Court, and knew or ought to have known that according to the well-settled chancery practice in Maryland all testimony not excepted to would be considered by the Court in giving its decision, he certainly had all the "due process of law" that he had a right to ask for.

Pennoyer vs. Neff, 95 U. S. 733.
Hallinger vs. Davis, 146 U. S. 320.

The plaintiff in error did not claim in the Circuit Court No. 2, or in the Court of Appeals, that section 34 of Art. 5 is in violation of that clause of the 14th amendment, which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and we do not understand in what respect it is claimed that it does.

L. P. HENNIGHAUSEN,
M. R. WALTER,
Counsel for Defendant in Error, for the purposes of this Motion.

IN THE

Supreme Court of the United States

[redacted] No. 1260. [redacted]

JOHN LOEBER, *Plaintiff in Error*,

vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased,
Defendant in Error.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF THE PLAINTIFF IN ERROR OR MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

WILLIAM COLTON,
Counsel for Plaintiff in Error.

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II.

But if this Court should be of opinion that the Federal question is properly before it, then we ask that *the order of the Court of Appeals of Maryland be affirmed, because the question on which the jurisdiction depends is so frivolous as not to need further argument.*

As the plaintiff in error was duly summoned, appeared, answered, took testimony, argued the case, had a full opportunity to meet the case made by the proof offered by Schroeder in the Court below, and if he thought that any of the testimony was inadmissible under the allegations of the bill, had the right to except thereto and have it excluded from the consideration of the Court, and knew or ought to have known that according to the well-settled chancery practice in Maryland all testimony not excepted to would be considered by the Court in giving its decision, he certainly had all the "due process of law" that he had a right to ask for.

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L. P. HENNIGHAUSEN,
M. R. WALTER,
Counsel for Defendant in Error, for the purposes of this Motion.

Office Supreme Court U. S.
FILED.
MAY 1 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

TERM No. 1280. **OCTOBER TERM, 1892.**

JOHN LOEBER, *Plaintiff in Error,*

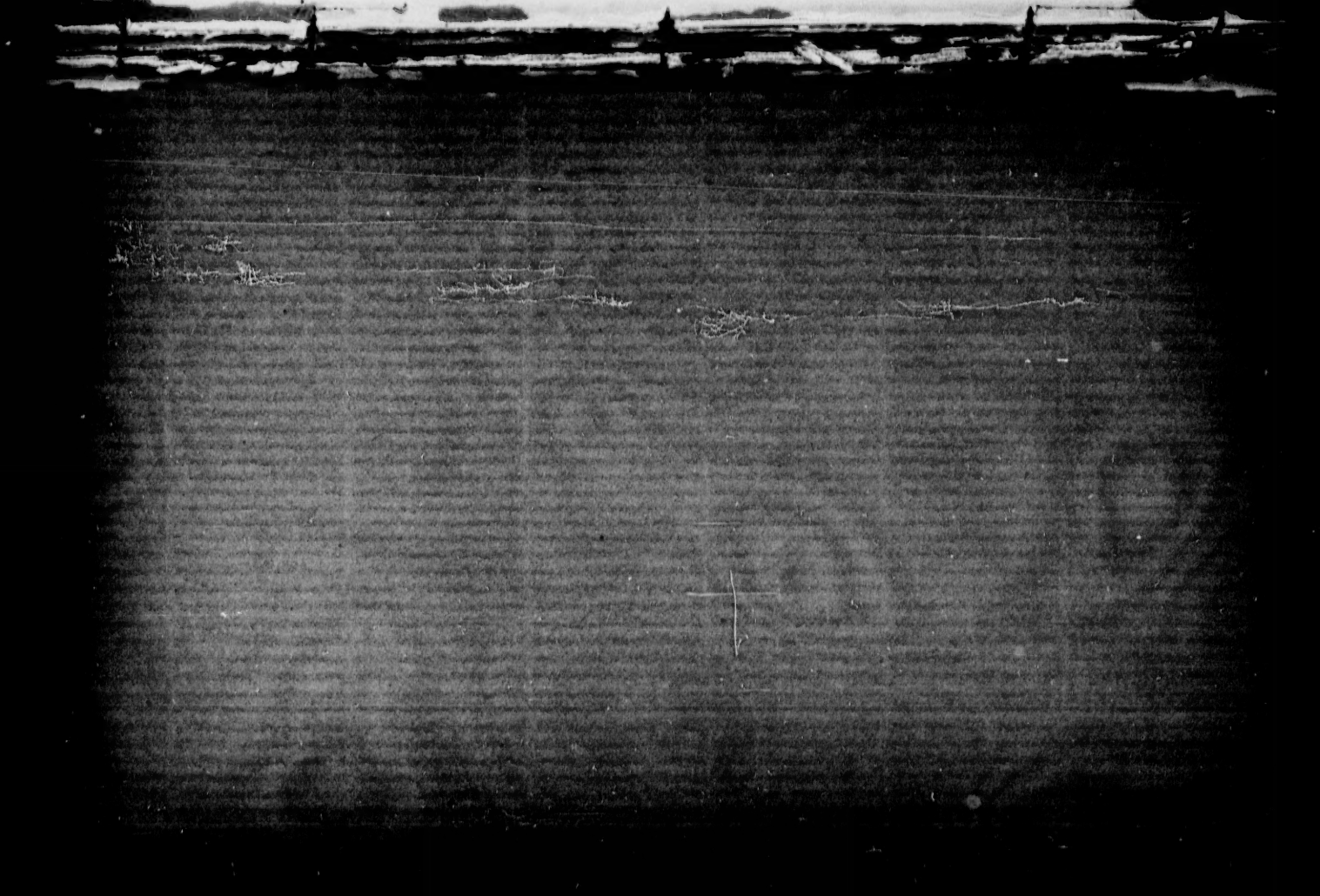
vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased,
Defendant in Error.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF THE PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

WILLIAM COLTON,
Counsel for Plaintiff in Error.



IN THE

Supreme Court of the United States.

TERM No. 1280. OCTOBER TERM, 1892.

JOHN LOEBER, *Plaintiff in Error*,

vs.

J. HENRY SCHROEDER,
Administrator of Catherine Loeber, Deceased,
Defendant in Error.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF THE PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

STATEMENT.

A bill in equity was filed by the defendant in error, J. Henry Schroeder, the administrator of Catharine Loeber, alleging that she, Catharine Loeber, *loaned* her husband, John Loeber, money upon his promise to repay the same, after her death, to her children, (Record, page 4.)

An answer was filed by the plaintiff in error, John Loeber, denying the allegation, and containing exceptions to the bill. (Record, page 6.)

Testimony was taken, and the Court, (Circuit Court No. 2 of Baltimore City,) dismissed the bill upon one of the exceptions thereto in the answer. (Record, page 54.)

The said defendant in error, without amending, took an appeal to the Court of Appeals of Maryland. (Record, page 55.)

The said Court of Appeals reversed the decree passed by the lower Court, finding from the evidence "that John Loeber undertook to invest his wife's money for *her* benefit in certain houses which belonged to him;" that his contract being parol was not valid at law, nor specifically enforceable in equity, and that therefore equity should decree compensation measured by the amount of money advanced under such contract, which said Court of Appeals found was $8,000, for which sum said Court of Appeals thereupon undertook to pass an *original* final decree. (Record, page 58.)

The plaintiff in error thereafter filed in said Court of Appeals a motion for re-argument, assigning the following reasons:

1st. There is no allegation in the bill of the contract upon which the decree is passed.

2d. The bill alleges a *loan* from Mrs. Loeber to her husband, the plaintiff in error, upon his undertaking to repay the same to her children, but does *not* allege any other undertaking or contract on his part.

3d. The bill, *as it stands*, states no case within the jurisdiction of the Court below, (the Circuit Court No. 2 of Baltimore City), and therefore no case upon which this Court, the Court of Appeals of Maryland, upon appeal therefrom, can pass a final decree for complainant.

4th. The bill *as it stands*, states only one cause of action, *a loan*, and in *that* the complainant has no interest.

The said Court of Appeals filed an opinion, overruling the motion, and declaring that the statute, Code, art. 5, sec. 34, "required that we should make our decision on the evidence in the case without regard to the averments in the bill of complaint." (Record, page 62.)

Upon this decree so passed against him, upon a matter with which he had never been charged, which he had no

opportunity to deny or disprove, for the same opinion which informed him of the charge also made known to him the decision against him, a writ of *fi. fa.* issued from said Court of Appeals of Maryland, returnable to said Circuit Court No. 2 of Baltimore City, in which said Court the plaintiff in error promptly appeared and filed his petition and motion to quash said writ, alleging as reasons, among others:

1. Because said writ and the decree on which said writ issued, both, and each thereof, was void.

2. Because said writ was issued, and said decree passed, in violation of the Constitution of the United States, and amendments thereto, and the laws passed by Congress in pursuance thereof.

3. Because by said writ the plaintiff in error would be deprived of his property without due process of law.

4. Because said decree deprives said plaintiff in error of his property without due process of law.

5. Because said decree was passed and said writ issued in violation of the 14th amendment of the Constitution of the United States.

6. Because said decree was passed without any jurisdiction in the Court rendering the same.

7. Because said Court had no jurisdiction upon the case made by the bill.

8. Because sec. 34 of art. 5 of the Code of Public General Laws of Maryland, in so far as it requires the said Court of Appeals to make their "decision on the evidence in the case, without regard to the averments of the bill of complaint," is contrary to the Constitution of the United States, and amendments thereto, and laws passed in pursuance thereof, and is therefore void.

9. Because said statute of Maryland is contrary to the 14th amendment of the Constitution of the United States, and is therefore void.

On which an order *nisi* was passed and a stay of proceedings granted; and upon the hearing thereof, the prayer of

said petition was denied and the motion to quash said writ overruled.

Whereupon, the plaintiff in error sued out a writ of error, assigning substantially as his reasons the following:

1st. Because section 24 of art. 5 of the Public General Laws of Maryland is repugnant to that clause of the 14th amendment to the Constitution of the United States which declares that no State shall deprive any person of his property without due process of law.

2d. Because said sec. 34, art. 5 is repugnant to that clause of the 14th amendment of the Constitution of the United States, which declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

From which said decretal order of said Court an appeal was taken, by the plaintiff in error, to the said Court of Appeals of Maryland, and by the final decree of said Court, being the highest Court of the State of Maryland, the same was affirmed.

Argument.

I.

This Court has jurisdiction in the premises.

In Home Ins. Co. vs. Augusta, 93 U. S. 116, this Court says:

"Where a judgment or decree is brought to this Court by a writ of error to a State Court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of these categories:

"1st. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision must have been against the claim which either was relied upon to maintain.

"2d. Or there must have been drawn in question a statute of, or authority exercised under a State, upon the ground of repugnance to the Constitution or a law or

treaty of the United States; and the decision must have been in favor of the validity of the State law or authority in question.

"3d. Or a right must have been claimed under the Constitution, or a treaty or law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed.

R. S. 132, sec. 709, and citations there given."

In the case at bar there was drawn in question the validity of a statute of Maryland, to wit, article 5, section 34, Code Public General Laws of Maryland, on the ground of its being repugnant to the fourteenth amendment of the Constitution of the United States, and also the question of the validity of authorities exercised under said State, to wit, the writ of *fi. fa.* issued by the Court of Appeals of Maryland, and the authority of said Court to pass the decree under which said writ was issued, on the ground of their being repugnant to said fourteenth amendment; and also the question of the right claimed by the plaintiff in error, under said amendment, of being informed by means of allegations in the bill of complaint of the matters charged against him, before being answerable therefor in a Court of equity; and also the question of the right or immunity claimed by the plaintiff in error, under the said amendment, that he should not be deprived of his property by means of a writ of *fi. fa.*, itself void, and issued on a void decree, as he claimed, and said decision was against the said rights, and the said immunity so claimed by the plaintiff in error under the said amendment, and said decision was in favor of the validity of said statute, and said authorities so assailed by him, as repugnant to said amendment. (Record, pages 69, 70, 71.)

This case is therefore within two of the categories stated in said case of Ins. Co. vs. Augusta, *supra.*

But the defendant in error contends that the decree of said Court of Appeals of Maryland, affirming the order of the lower Court in overruling the petition and motion

of the plaintiff in error, to quash the writ, &c., in this case, is not "a final judgment or decree" within the meaning of the Judiciary Act, and cites Boyle vs. Zacharie, 6 Peters, 657, and other authorities in support thereof.

In that case, Mr. Justice Story says in his opinion, page 656: "It is material to state that no error is assigned on the *original judgment* or in the *award of the fieri facias* which indeed are *conceded* to have been *rightfully* issued, and to be *above exception,*" and quotes with approval the language in Coke Litt., 288*b*., "a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution" in a suit.

And the same state of facts substantially exists in the other cases cited by the defendant in error in this connection.

How different from the facts in the case at bar, where it is insisted that the decree on which the writ of *fi. fa.* issued, and the writ of *fi. fa.*, both and each of them, are *absolutely void.*

An order dismissing a petition in the nature of an *audita querela* is final, on which a writ of error may be sued out.
New Orleans R. Co. vs. Morgan, 10 Wall., 262.

The petition and motion to quash in the case was more than the usual motion to quash an execution in ordinary cases; it recited that the writ of execution and the decree upon which it was issued, both and each was void; that thereby the plaintiff in error was and would be deprived of his property without due process of law; that the decree was passed and the writ issued in violation of the Constitution of the United States, and amendments thereto, and the laws passed in pursuance thereof by Congress; that the decree and writ thereon were passed and issued by the Court without any jurisdiction in the premises; that Art. 5, sec. 24 of the Public General Laws of Maryland is repugnant to the XIV Amendment to the Constitution of the United States, (by authority whereof said decree was passed and said writ issued,) and therefore void.

That upon said petition and motion, the Court below ordered the Sheriff of Baltimore City to return said writ, together with his proceedings thereunder, immediately before said Court. And a day was "fixed for a hearing of said motion, petition and adjudication thereon," due provision being made for notice to the defendant in error, and the proceedings under said writ were stayed, pending said hearing and adjudication.. (Record, pages 64-5.)

And upon final hearing thereof, the petition and motion was dismissed and the injunction dissolved.

And upon appeal to the Court of Appeals of Maryland, the action of the Court below was affirmed by its final decree. "It is called a final decree in the Record, and treated as such by the Court and the parties," and upon it as such the writ of error was sued out in this case, which said writ of error should not be dismissed for the reason assigned on the motion filed herein. (See last few lines of opinion in Insurance Co. vs. Augusta, *supra.*)

The old writ of *audita querela* is now obsolete, and relief is granted on motion where *audita querela* was formerly brought.

3 Black Com. 406.

The proceeding by writ of *audita querela*, is now generally superseded by the more summary method of application for relief, by motion upon notice to adverse party.

Shafer vs. Shafer, 6 Md. 524.
Huston vs. Ditto, 20 Md. 705.
Longwith vs. Scriven, 2 Hill, (S. Car.) 298.
Dunlap vs. Clements, 18 Ala. 778.
Chambers vs. Neal, 13 B. Mon. (Ky) 256.
Marsh vs. Haywood, 6 Humph. (Tenn.) 210.
McMullan vs. Baker, 20 Kan. 50.
Donelly vs. Favey, 18 Wis. 571.
Daly vs. Derringer, 1 Phila. 324.
Shore vs. Becker, 8 Serg. & R. 239.
Whiterow vs. Keller, 11 Ib. 274.
Baker vs. Judge, 4 Johns (N. Y.) 191.
Smock vs. Dade, 5 Rand. (Va.) 639.

In 1 Bos. and Pul. 428, Ch. J. Eyre, says:

"I take it to be the modern practice to interfere in a summary way in all cases where the party would be entitled to relief on an *audita querela.*"

And in 4 Burr. 2287, it is asserted as a general rule that the Courts will not put the defendant to the trouble and expense of an *audita querela*, but will relieve him in a summary way, on motion.

The plaintiff in error has had no legal opportunity to avail himself of the matters of defense set forth in his petition and motion to quash, because the same opinion (of the Court of Appeals of Maryland) which informed him of the charge, also informed him of the decision made against him; he has been denied an opportunity to refute and disprove the charge—not made in the bill of complaint exhibited against him, but formulated by the Court of last resort against him, from the evidence.

The petition and motion goes to the validity of the proceeding and process; ordinarily a motion to quash an execution is not an appropriate or an admissible mode of bringing under review the errors or irregularities that may exist in the judgment upon which the execution issued, *unless such judgment be utterly void.*

Schultz vs. State, 43 Md. 305.

Writ of error will lie when the party is aggrieved in the foundation, proceedings, judgment or execution.

Wayman vs. Southard, 10 Wheat. 23.
Sydam vs. Williamson, 20 How. 437.
Riggs vs. Johnson Co., 6 Wall, 187.

The plaintiff in error contends that the decree and the writ passed and issued in this case both and each are void.

The *decree* passed by the Court of Appeals of Maryland in this case is *void,* because the allegations of the bill of com-

plaint gave no jurisdiction to the Court of equity to pass *any* decree for the plaintiff, now defendant in error.

The contract alleged in the bill is a simple case of debt due the children of the wife of the plaintiff in error, upon which said children could only sue in a Court of law, and upon which neither the said wife nor (she being dead) her administrator, (the defendant in error,) could sue either at law or in equity.

Hendrick vs. Lindsay, 93 U. S., 149.
Seigman vs. Hoffacker, 57 Md., 325.
I Chitty, Pl., 5 and 6.
Adair vs. Winchester, 7 G. & J., 114.
Bradley vs. Ammidon, 10 Paige, 235.

In Seigman vs Hoffacker, supra, the Court of Appeals of Maryland says: "In a matter of simple contract a promise to one for the benefit of another may be enforced by the *person for whose benefit* the promise was made; and unless the promisee has some *beneficial interest himself* he cannot maintain the suit. (1 Chitty Pleading, 5 and 6, and authorities cited.) In such cases the suit is brought by the person beneficially interested, and the narr. alleges the promise to be to him, and the proof that it was made to another for his benefit, is admitted to support the declaration."

Small vs. Schaefer, 24 Md. 158.

Yet the Court of Appeals says in this case: "But surely the party to whom the promise was made on valuable consideration, could sue for the breach of it, and this right of action would devolve upon her representative."

Could she sue for a breach of a contract which could not be broken until after she died, and could this right of action which she never had, devolve upon her representative?

Again, the said Court in its opinion says, that the party to whom the promise is made is a *trustee* for those bene-

ficially interested; if so, how could the right of action in her, *not in her own right, but as trustee*, devolve upon her *administrator?*

The defendant in error, plaintiff below, therefore, had no interest in the matter, and the point being expressly raised in the answer of the plaintiff in error by exception (as he is expressly allowed to do by rule 23, Code Public General Laws of Maryland, sec. 142,) the Court below (Circuit Court No. 2 of Baltimore City) rightfully dismissed his bill (Record, page 54); beside which objection, chancery has no jurisdiction where the bill presents nothing more than an action for money had and received.

Hertle vs. Schwartz, 3 Md. 383.
N. Y. &c Co. vs. Memphis Water Co., 107 U. S. 214.

Where a Court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a Court of equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury.

Hipp vs. Babin, 19 How. 271.
Parker vs. Winnepseoga Co., 2 Black, 551.
Smith vs. Bourbon Co., 127 U. S. 511.

2. The *decree* is *void* because passed upon a matter not alleged in the bill and not in issue.

"It is the invariable and universal rule of the Court of Chancery to found its decrees on some matter put in issue between the parties by the bill and answer."

"The rule is explicit and absolute that a party must recover in chancery according to the case made by his bill, or not at all, '*secundum allegata*', as well as '*probata.*'"

Bailey vs. Ryder, 10 N. Y. 369–370.

In Reynolds vs. Stockton, 140 U. S. at page 270, the Court quotes with approval the language of circuit

judge Wallace in Smith vs. Ontario, 18 Blatch. 454, that the "matter in issue" has been defined in a case of leading authority as "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings."

See also—Munday vs. Vail, 34 N. J. Law, 314.
Friedenwald vs. Shipley, 74 Md. 220.
Windsor vs. McVeigh, 93 U. S. 283.
Tomlinson vs. McKaig, 5 Gill, 276.

Slingluff vs. Stanley, 66 Md. 225, in which the Court, speaking through Ch. J. Alvey, says: "It is the allegations of the bill which confer jurisdiction and which are to determine the power of the Court."

And the same Court, in Gibson vs. Cook, 62 Md. 260, say, Irving, J.: "We have nothing to do with the *facts* of the case only so far as they are stated in the pleadings and raise the question of jurisdiction."

Does article 5, section 34, of the Code of General Laws of Maryland compel the Court of Appeals decree in the case, on facts disclosed in evidence, "without regard to the averments of the bill?" (Record, page 62.)

Story Eq. Pl. sec. 257, says, "no evidence can be legally adduced in denial of a matter not in issue."

The bill is silent as to the contract found proven by the Court of Appeals of Maryland. Had the bill been amended by alleging the contract found proven by said Court of Appeals, and thus entirely changed the nature of the case and the character of proof, the plaintiff in error would have had an opportunity to answer and defend.

In this case was there any issue on the point determined, to wit, "that the plaintiff in error undertook to invest his wife's money, for her benefit, in certain houses which belonged to him?" Or, did not the defendant in error only say, "You borrowed money from my intestate, promising to pay it back to her children?"

Answer. "I did not."

Again, he say: "You used the money so borrowed by you in improving your land?"

Answer. "I did not," and proved it, though an immaterial issue.

No other issue is made by the pleadings and nowhere is it alleged that plaintiff in error undertook to invest his wife's money for her benefit, in his houses.

It is nowhere alleged that he used her money in the improvements, but it is alleged that he *borrowed* it upon a promise to repay her children; and then after he *had* borrowed it, that he used it building.

3. The *decree* is *void* because passed upon a matter not alleged and not in issue, contrary to the fundamental, invariable and universal rule of chancery, and in violation of that clause of the 14th amendment to the Constitution of the United States, which forbids a State to deprive any person of property "without due process of law."

If the statute, art. 5, sec. 34, aforesaid, directed the Court of Appeals of Maryland to decree upon a matter not alleged, upon which there was no issue, upon which the plaintiff in error could not legally and did not offer evidence, then said statute directed said court to deprive the plaintiff in error of property without due process of law, and this neither Assembly nor Court can do since the 14th amendment to Constitution of the United States; and any act or decree attempting to do it, is not *voidable* or *reversible merely*, but *void*.

Cooley, Const. Lim., 14, note 2; 15, note 1.
Virginia vs. Rives, 100 U. S. 313.
Ex parte Virginia, Ibid. 339.
Ulman vs. M. & C. C. of Balto., 72 Md. 587.

A void judgment, if there be a higher Court, may be

reversed; but the defendant is not compelled to reverse it, but may resist it collaterally in same or any other Court.

Needham vs. Thayer, 147 Mass. 537.
Pennoyer vs. Neff, 95 U. S. 714.
Williamson vs. Berry, 8 How. 540-2.
Hickey vs. Stewart, 3 How. 750.
United States vs. Walker, 109 U. S. 258.

Due process of law, when applied to "judicial proceedings" means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

Pennoyer vs. Neff, 95 U. S. 733.

That a Court of equity can decree only upon the allegations of the bill is both a rule and principle—a rule of Court applying the principle of natural justice that a man should be informed of the matter charged against him before being condemned. It is a rule and principle which has been established in our system of equity jurisprudence as long as the system itself. And it is a rule and principle which has been established in our system of jurisprudence for the protection and enforcement of private rights, to wit, the rights of the plaintiff in error, not to have his property taken from him arbitrarily, and by surprise, and to be informed of the matter charged against him and to have an opportunity to deny and disprove it.

"No rule is *better settled* than that the decree must conform to the *allegations* as well as the proofs in the cause. * * * The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a Court of Chancery—rules which have been established for ages on the soundest and clearest principles of general utility."

Crocket vs. Lee, 7 Wheat. 525-7.

"If the *pleadings* in the case were to give no notice to the parties or to the Court, of the material facts on which the

right asserted was to depend, no notice of the points to which the testimony was to be directed and to which it was to be limited, if a *new* case might be made out in the *proof*, differing from that stated in the proceedings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place."

Ibid.

"The rule that the decree must conform to the allegations, as well as to the proofs of the parties, *is not only one which justice requires, but one which necessity imposes on Courts.*"

Ibid.

See also—

Bailey vs. Ryder, supra.
Hayward vs. Carroll, 4 H. & J. 54.
Dilly vs. Barnard, 8 G. & J. 171.
Paine vs. France, 25 Md. 163.
Willis vs. Owen, 43 Texas, 41.
Cooley, Con. Lim., 433.
Story, Eq. Pl., sec. 257.
Fox vs. Reynolds, 50 Md. 564.
Wilson vs. Green, 63 Md. 547.

The decree being void because passed without jurisdiction and contrary to the 14th amendment to the Constitution of the United States, and for other reasons above mentioned, is invalid for any purpose and of no force in the same or any other Court.

"A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale, by virtue of its authority, finds himself without a title and without redress. The first and most material inquiry in

relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or vitality."

Freeman on Judgments, sec. 117.

"A judgment without jurisdiction is not entitled to any respect in the State where rendered."

Pennoyer vs. Neff, 95 U. S. 732.

And is without binding force in the Courts of the same State.

Reynolds vs. Stockton, 140 U. S. 271.

In Williamson vs. Berry, 8 How. 540-1, the Court says: "The jurisdiction of any Court exercising authority over a subject may be inquired into in every other Court when the proceedings of the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings; * * * but if it act without authority, its judgment and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers."

Elliott vs. Piersol, 1 Pet. 328.
Hickey vs. Stewart, 3 How. 350.

Want of jurisdiction may be shown either as to *subject-matter*, or the *person*, or in proceedings *in rem*, as to the *thing*.

Thompson vs. Whitman, 18 Wall. 457.
Cooper vs. Reynolds, 10 Wall. 308.

In Latham vs. Edgerton, 9 Cowen 227, L. had obtained judgment before a justice. E. appealed to the Court of

Common Pleas, which reversed the judgment, but from a defect in the bond the Common Pleas did not in law acquire jurisdiction of the appeal, and its order of reversal was void.

L. sued again on the justice's judgment, to which E. pleaded the reversal on appeal. The justice decided in favor of L. The Common Pleas again decided in favor of E. and the Supreme Court reversed the Common Pleas. They say: "The plaintiff below might have applied to the Court to set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment or decision of the Court was set up against him, and then to shew that the proceedings were void for want of jurisdiction. * * * The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose."

This citation from 9 Cowen quoted and approved in 8 Howard, 542.

The Supreme Court of New York, after the establishment of the Court of Errors and Appeals, when applied to to carry out a sentence of the latter, determined that they had the right to inquire into the jurisdiction of the Court of Errors and Appeals to pronounce the sentence.

People vs. Clark, 1 Parker C. R. 361.

In the case of Kingsbury vs. Buckner, 134 U. S. 650, 675, this Court decides that the decree of the Supreme Court of Illinois, on an appeal from the Circuit Court for Cook County, might be attacked in the Circuit Court for Cook County, on the ground of want of jurisdiction, but not for fraud in obtaining the decree.

That judgments without jurisdiction are void is now book law, and the following cases are simply cited as illustrating the principle that such judgments will be held void in a collateral proceeding.

Atty.-Gen'l vs. Ld Hatham, 1 Turn & Rus. 11) Eng. Ch.) 209.

Ex parte Sawyer, 124 U. S. 200.

Jones vs. Ritter, 56 Ala. 270.
Gremmort vs. Askern, 48 Ark. 151.
King vs. Randlet, 33 Cal. 318.
Green vs. Clawson, 4 Houst. (Del.) 159.
Louisville vs. Hubbard, 116 Ind. 193.
Long vs. Barnett, 13 Iowa 28.
Buffam vs. Ramsdell, 55 Me. 252.
Smith vs. Knowlton, 11 N. H. 191.
Hill vs. Robertson, 1 Strobh. (S. Car.) 1.
Bender vs. Damon, 72 Tex. 92.
State vs. Wakefield, 60 Vt. 618.
Dillard vs. Central Co., 82 Va. 734.

A void judgment is always subject to collateral attack, and it can derive no legal sanction from lapse of time.
Paul vs. Willis, 69 Tex. 261.

The writ is void, because issued on a void decree.
Freeman on Ex., sec. 73.
Schultze vs. State, 43 Md. 296.

The matter was not *res judicata* as contended by the defendant in error, because:

1st. As the Court of Appeals of Maryland had no authority and jurisdiction to pass the decree, their subsequent declaration that they had, gave it no force.

A void decree can not be cured by any subsequent act of the Court or Assembly or both.
Roche vs. Waters, 72 Md. 264.
Brignerdello vs. Gray, 1 Wall. 627.

2nd. Because the point that the decree is contrary to the 14th amendment and void was not distinctly raised, nor was the point that art. 5, sec. 34, of the Code of General Laws of Maryland, as construed by said Court of Appeals raised at all.

Upon the federal question being raised the Court is not bound by its previous decision on the same point when the